Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

LES HADLEY,
Petitioner,

v.

NORTH ARKANSAS COMMUNITY TECHNICAL COLLEGE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

James G. Lingle,
Counsel of Record,

Barbara Lingle,
and
Charles Kester
LINGLE LAW FIRM
5 Halsted Circle
Rogers, Arkansas 72757
501-636-7899

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Questions Presented

1. Whether an educational entity that has the power to issue bonds and to levy taxes and that receives substantial state funding is an "arm of the state" entitled to Eleventh Amendment immunity because any judgment must necessarily be paid out of state funds?

2. What factors are to guide the federal courts in their evaluation of whether an entity with mixed state and local characteristics, such as a community college, is entitled to Eleventh Amendment immunity?

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Opinions Below

The order denying Hadley's petition for rehearing with suggestion for rehearing en banc, entered April 19, 1996, and the opinion of the Honorable Theodore McMillian and Diana E. Murphy, dissenting from the order, Pet. App. 30a-31a, are reported at 76 F.3d 1446.

The opinion of the United States Court of Appeals for the Eighth Circuit, entered February 14, 1996, and the opinion of the Honorable Donald Lay, dissenting from the opinion of the court, Pet. App. 3a-24a, are reported at 76 F.3d 1437.

The opinion of the United States District Court for the Western District of Arkansas, Fayetteville Division, No. 94-3035, entered July 21, 1995, Pet. App. 32a-53a, is unreported.

The order of remand and opinion of the United States Court of Appeals for the Eighth Circuit, No. 94-3703, entered June 5, 1995, Pet. App. 25a-29a, is unreported.

The opinion of the United States District Court for the Western District of Arkansas, Fayetteville Division, No. 94-3035, entered October 27, 1994, Pet. App. 54a-60a, is unreported.

Jurisdiction

The judgment of the court of appeals was entered on February 14, 1996. See Pet. App. 3a. A Petition for Rehearing with Suggestion for Rehearing En Banc was denied on April 19, 1996. Pet. App. 30a. This Petition For Writ of Certiorari is being filed within the time allowed by this Court under Supreme Court Rules, Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Constitution, Amendment XIV, section 1

> [N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 (1994)

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes

to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case

North Arkansas Community Technical College (hereinafter "NACTC"), is a community college in Arkansas. On June 7, 1994, Les Hadley, a former NACTC vocational instructor, filed an action against NACTC alleging that NACTC violated Hadley's Fourteenth Amendment right to procedural due process when it terminated his employment without notice,[1] and seeking damages.[2] NACTC moved for summary judgment, arguing that it is an "arm of the state" of Arkansas that is entitled to Eleventh Amendment immunity from Hadley's federal court damage action.

Arkansas, like many states, has a detailed statutory scheme that governs the operation of a community college such as NACTC, defined as "an educational institution established or to be established by one (1) or more counties or cities of this state...." Ark. Code Ann. § 6-61-501(1) (Michie 1993 & Supp.

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[1]The district court had subject matter jurisdiction over Hadley's 42 U.S.C. § 1983 claim under 28 U.S.C. § 1331 (1994). Hadley's complaint also asserted a state law claim of breach of contract. Subject matter jurisdiction for this pendent state claim was provided under 28 U.S.C. § 1367 (1994). The district court declined to exercise jurisdiction over this pendent state law claim and dismissed it without prejudice. Pet. App. 60a.

[2]In the year before his termination, Hadley earned $23,010.00. Pet. App. 89a.

1995). Although community colleges are subject to regulation by the State Board of Higher Education, see Ark. Code Ann. § 6-11-101 et seq (Michie 1996); Pet. App. 61a-69a, the Arkansas Code also vests these institutions with substantial autonomy. For example, local control of each community college is "vested in a local board composed of nine (9) members who are residents and qualified electors of the community college district." Ark. Code Ann. § 6-61-520(a) (Michie 1993 & Supp. 1995). This Board governs the operation of NACTC, Pet. App. 85a, and has authority to, inter alia, (1) enter into contracts; (2) acquire, own, lease, use, and operate property; (3) dispose of property owned by the college; (4) exercise the right of eminent domain; (5) select its own chairman and other officers; (6) determine, with advice of the State Community College Board, the educational program of the school; (7) appoint members of the administrative and teaching staff; (8) accept grants of money or property from any governmental agency; and (9) exercise all other powers consistent with state law which may be necessary to establish, maintain, and operate the community college. Ark. Code Ann. § 6-61-521 (Michie 1993 & Supp. 1995). The board may also issue bonds and levy taxes. Ark. Code Ann. §§ 6-61-517 (taxes) & 6-61-604 (bonds) (Michie 1993 & Supp. 1995). The State of Arkansas has disclaimed liability on such bonds. Ark. Code Ann. § 6-61-1009 (Michie 1993 & Supp. 1995).

NACTC has several sources of revenue, some of which are for restricted use. Tuition payments from students total $1,398,589 (13.2% of total funds), and are to be used for

"educational" expenses. Pet. App. 62a. NACTC receives $80,424 in indirect cost allowances included on federal grants to cover "overhead expenses." Pet. App. 62a. NACTC receives $591,885 (5.6% of total funds) in "other" funds, consisting predominantly of funds from the non-profit NACTC Foundation. Pet. App. 64a. NACTC has discretionary control over $99,943 of these "other" funds. Pet. App. 70a. NACTC has local tax revenues of $317,366 (3.0% of total funds) from a levy of 1.7 mills on real property and 3.4 mills on personal property located in Boone County.[3] Pet. App. 63a. Together with $650 in donations, Pet. App. 63a, these revenue sources provide $1,896,972 of non-state funds to NACTC. The remainder of NACTC's funding (58.2% of total budget) consists of funds appropriated by the General Assembly.[4] Pet. App. 70a.

One of Arkansas' statutory mechanisms for resolving any budgetary shortfall experienced by a community college is an

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[3]Section 2 of Amendment 52 of the Arkansas Constitution provides that no millage "shall be levied upon the property in an established [community college] district except upon the approval of a majority of the qualified electors of such proposed or established district voting thereon." The current millage was authorized by such a vote in 1977 "as a continuing annual levy as provided by law for the support of North Arkansas Community College." This 1977 levy renewed a 1973 levy "to provide all or part of the funds for the purchase of lands and for the construction and furnishing of buildings and facilities for" NACTC. Ark. Code Ann. § 16-65-117 (Michie 1987 & Supp. 1995) provides that any judgment against NACTC may become a lien on NACTC's real property (located in Boone County) when filed with the clerk of the Circuit Court of Boone County.

[4]Funds appropriated by the General Assembly are subject to State reporting and disbursement requirements. Funds derived from local taxes are exempted from these requirements. Ark. Code Ann. § 19-4-803(b)(1) (Michie 1994 & Supp. 1995).

increase in local millage. See Ark. Code Ann. § 16-61-602(c) (Michie 1987 & Supp. 1995).[5] The district court found that "the college has the authority to levy further taxes." Pet. App. 43a. The 1973 and 1977 special elections authorized a 5 mill tax, Pet. App. 71a-72a, providing NACTC with authority to increase the levy by 1.6 mills on personal property and 3.3 mills on real property. Such an increase would yield total revenues of $466,714.71 to $933,429.41, depending upon the precise mix of taxable personal and real property located in the district.

The district court denied NACTC's motion, relying upon Parsons v. Burns, 846 F. Supp. 1372 (W.D. Ark. 1993), appeal dismissed, No. 94-2798 (8th Cir. Aug. 17, 1995),[6] to hold that NACTC was not an arm of the state but more like a political subdivision for purposes of the Eleventh Amendment. NACTC appealed from the order denying immunity.[7] The court of appeals vacated the district court order and remanded the case for consideration in light of Sherman v. Curators of Univ. of Mo., 16 F.3d 860 (8th Cir. 1994), and Greenwood v. Ross, 778

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[5]State contributions are another means of funding a shortfall. See Ark. Code Ann. § 6-61-601(c)(2) (Michie 1993 & Supp. 1995). However, these contributions are subject to a maximum limit. Ark. Code Ann. §§ 19-5-402 & 19-5-404 (Michie 1994 & Supp. 1995); Pet. App. 81a. NACTC has already met and exceeded this statutory maximum. Pet. App. 56a.

[6]In Parsons, the district court determined that Northwest Arkansas Community College, which exists under the same statutory scheme, is subject to suit. 846 F. Supp. at 1380.

[7]A denial of Eleventh Amendment immunity falls within the collateral order exception to 28 U.S.C. § 1291 (1994).

F.2d 448 (8th Cir. 1985). Pet. App. 28a-29a.

On remand, the district court recited the nine factors recognized by the Eighth Circuit in Sherman, but confined its analysis to the framework established in Greenwood. Pet. App. 35a-36a. After reviewing facts bearing on NACTC's funding and autonomy, the court granted NACTC's motion for summary judgment. Pet. App. 53a.

On February 14, 1996, the court of appeals, which had retained jurisdiction over the original appeal, Pet. App. 28a, entered an order affirming the district court's decision, with one member of the panel dissenting. The panel majority recited the two-pronged Greenwood test and then examined the funding and autonomy of NACTC. The panel majority discounted the availability of discretionary non-state funds, stating that "traditional Eleventh Amendment cases did not require a speculative analysis of whether a college largely funded by the state might be able to pay a judgment in the first instance from other revenue sources[.]" Pet. App. 11a. Judge Lay dissented from the opinion of the panel majority, observing that the majority's "decision amplifies the disarray of approaches applied by lower courts when confronted with the defense of Eleventh Amendment immunity by state-created entities." Pet. App. 15a.

Hadley filed a Petition for Rehearing with Suggestion for Rehearing En Banc which was denied by an order entered April 19, 1996, from which two members of the court of appeals dissented. This dissent specifically noted that:

The majority holding that NACTC enjoys Eleventh

> Amendment immunity . . . defies Supreme Court precedent, the law of this circuit, and the law of Arkansas. The decision promises to expand uncertainty for litigants and district courts as to future Eleventh Amendment cases in this circuit. . . . Hopefully, the Supreme Court of the United States will give us further direction.

Pet. App. 31a (footnotes omitted).

Reasons for Granting the Petition

In Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977), Lake Country Estates, Inc. v. Tahoe Reg. Planning Agency, 440 U.S. 391 (1979), and Hess v. Port Auth. Trans-Hudson Corp., -- U.S. --, 115 S. Ct. 394 (1994), this Court gave guidance to courts determining whether an entity is an arm of the state or a political subdivision. In Mt. Healthy, this Court delineated four factors these courts should consider: (1) the characterization of the entity under state law; (2) the degree of state control and supervision over the entity; (3) the degree of State funding; and (4) the ability of the entity to issue bonds and levy taxes on its own behalf. 429 U.S. at 280.

Two years later, in a case involving a bi-state agency, this Court considered six similar factors which elaborated upon and added to the Mt. Healthy factors. Lake Country, 440 U.S. at 401-02. Two terms ago, "in an opinion that is certain to generate confusion," Gray v. Laws, 51 F.3d 426, 431 (4th Cir. 1995), this Court resolved a conflict between the Second and Third Circuits regarding the status of PATH, a bi-state entity. This Court stressed the narrow scope of the issue, Hess, 115 S. Ct. at 406, and used Lake Country as a basis for an analysis of

multi-state entities. Id. at 402. This Court also determined that "vulnerability of the State's purse is the most salient factor in Eleventh Amendment determinations." 115 S. Ct. at 404.

Despite the guidance given by these cases, "[i]t is impossible to glean from the Court's opinion in Hess the precise differences between the analyses governing multi-state entities and single state entities." Gray, 51 F.3d at 432. As a result, several critical questions remain unanswered for single state entities: (1) how should "vulnerability of the State's purse" be evaluated (i.e., how directly must the action affect the State treasury, and how certain must the effect be in order to trigger immunity); (2) when and how do "other 'relevant considerations' [identified in Lake Country and Hess] factor into the central inquiry into the action's effect on the state treasury and sovereignty[,]" id. at 433; and (3) what factors other than those identified in Lake Country and Hess are "relevant considerations." These questions have "afforded lower courts excessive discretion in fashioning their own formulae" and have permitted the circuit courts to "craft disparate tests and rely upon vague factors, thereby generating conflicting results." Alex E. Rogers, Note, Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine, 92 Colum. L. Rev. 1243, 1269-73 (1992).

I. This case provides the Court an opportunity to resolve a direct conflict between the circuits and to clarify the means by which "vulnerability of the State's purse" is to be evaluated for the purpose of Eleventh Amendment immunity.

The court of appeals reasoned that because 58.2% of NACTC's budget was provided by "state funds appropriated by the General Assembly . . . . it seems clear that NACTC is, both financially and institutionally, an arm of the State, and that any damage award to Hadley would inevitably be paid from the state treasury." Pet. App. 8a. As Judge Lay's dissenting opinion points out, this reasoning "adopts an 'impact' rule, which apparently reasons that, since the school's general operations are funded primarily by the state, any judgment paid by NACTC 'would produce a higher operating budget shortfall that must, by state law, be satisfied by an appropriation from the state treasury.'" Pet. App. 20a (quoting Maj. Op. at 8). The panel majority's "impact rule" defies this Court's precedent, creates three new circuit splits and exacerbates existing splits.

A. The decision below applied an "impact rule" that violates Supreme Court precedent and creates a split with the Third, Fifth and Tenth Circuits that have rejected an impact rule where an entity has the power to tax.

Determining whether a particular educational entity is an arm of the state is concededly a fact-intensive enterprise that requires a case by case review of the particular facts involved. Sherman, 16 F.3d at 863. Thus, the salient features of the defendant asserting immunity must be carefully defined. NACTC is a community college which is empowered to issue bonds and levy taxes. This taxing power distinguishes cases involving community colleges from cases that confer Eleventh Amendment immunity upon "state schools" even when those

schools receive a smaller percentage of their funding from the state. See, e.g., Kashani v. Purdue Univ., 813 F.2d 843, 845-46 (7th Cir.) (Purdue, which receives "slightly over 36% of its income from state appropriations" entitled to immunity because it "has no power to levy taxes" and "absence of the power to tax is a strong indication that [Purdue] is more like an arm of the state than like a county or city, because that enablement gives an entity an important kind of independence."), cert. denied, 484 U.S. 486 (1987).

In Mt. Healthy, this Court reasoned that although the defendant school board "receive[d] a significant amount of money from the State", it had "extensive powers to issue bonds and to levy taxes within certain restrictions of state law." This court concluded that "[o]n balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the state." Mt. Healthy, 429 U.S. at 280; accord Gary A. v. New Trier High Sch. Dist. No. 203, 796 F.2d 940, 945 (7th Cir. 1986) (defendant not immune despite "significant degree" of state funding because it had power to raise revenues independently); Dyson v. Lavery, 417 F. Supp. 103, 108-09 (E.D. Va. 1976) (same).

The rationale for the distinction emphasizing an entity's ability to levy taxes and issue bonds is simple:

> The power to raise funds is not an incidental indicator of autonomy: the state's election to so empower an entity evinces its desire that the entity operate without exclusive dependence on the state.

Rogers, 92 Colum. L. Rev. at 1306.

This analysis has been previously applied by this Court to an agricultural college that is not unlike NACTC. In Hopkins v. Clemson College, 221 U.S. 636 (1910), this Court confronted an action for damages against Clemson College. The college held title to real property, some of which was conveyed by the state, and other of which was derived from private donations. The State of South Carolina:

> appropriated more than $100,000 per annum, which, with the interest on the securities passing under the residuary clause of Dr. Clemson's will, constituted the main source of income, though the College did receive about $6,500 per annum from tuition, rent, sale of dairy products and the proceeds derived from the electric plant and textile department.

Id. at 640. Based on these non-state sources of income, this Court denied Clemson College's claim of immunity in an analysis that presaged Mt. Healthy. The panel majority's focus upon a bright line "impact rule" runs counter to Mt. Healthy and its progeny and directly conflicts with Hopkins.

The decision below also creates a circuit split. Three circuits have addressed claims of immunity by similarly situated institutions that have received greater levels of state funding than NACTC, and have concluded that the institution at issue was not entitled to Eleventh Amendment immunity. In Ambus v. Granite Bd. of Ed., the Tenth Circuit rejected the defendant's claim of immunity despite its receipt of 62.2% of its budget from state appropriations. 995 F.2d 992, 995-96 (10th Cir. 1993); accord Unified School Dist. No. 480 v. Epperson, 583 F.2d 1118, 1123 (10th Cir. 1978) (school district not entitled to

immunity despite receipt of "substantial state aid"). Similarly, the Fifth Circuit rejected a claim of immunity by a defendant despite evidence that the defendant received 70 to 80% of its funding directly or indirectly from the State.[8] Farias v. Bexar County Bd. of Trustees for Mental Health and Mental Retardation Services, 925 F.2d 866, 874-75 (5th Cir. 1991). The Third Circuit has rejected a claim of immunity by a defendant receiving 50 to 70% of its general operating account from state appropriations. Kovats v. Rutgers, The State Univ., 822 F.2d 1303, 1308-10, 1312 (3rd Cir. 1987); see also Samuel v. University of Pittsburgh, 375 F. Supp. 1119, 1127-28 (W.D. Penn. 1974) (Temple University, which received 48.1% of total revenue from the Commonwealth of Pennsylvania not immune), aff'd in relevant part, 538 F.2d 991 (3rd. Cir. 1976). By using the percentage of state funding to mechanically trigger an "impact rule," the panel majority has created a split between the Eighth Circuit and the Third, Fifth and Tenth Circuits, and has contravened this Court's decisions in Mt. Healthy and Hopkins.

B. The decision below refused to consider alternative sources of funding in deciding whether the State's purse was affected, and therefore violates Supreme Court precedent and creates a split with eight circuits that have viewed the presence of alternative sources of funding as essential to a finding whether the State's purse is affected.

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[8]In addition to this evidence, a Texas state statute provided that "amount of state funds used in the operation of the facility may not exceed sixty (60) percent of the total operating budget of that facility." Farias, 925 F.2d at 874.

In Edelman v. Jordan, this Court held that the Eleventh Amendment bars suits in federal court by "private parties seeking to impose a liability which must be paid from public funds in the state treasury[.]" 415 U.S. 651, 663 (1974) (emphasis added). This principle was reaffirmed in Hess. 115 S. Ct. at 404. The courts of appeals have consistently followed these directives, and have granted immunity only when a judgment must be paid out of state funds because of a lack of any alternative source of funding to pay the judgment. See, e.g., New York City Health & Hosp. Corp. v. Perales, 50 F.3d 129, 134 (2nd Cir. 1995) (immunity extends to "actions where liability, if imposed, must be paid from the state fisc"); Sherman, 16 F.3d at 864-65 ("the question . . . is not whether the University chooses to pay . . . damages out of state funds, but whether a judgment against the University can be paid from non-state funds under the University's discretionary control."); Hutsell v. Sayre, 5 F.3d 996, 999 (6th Cir.) (Eleventh Amendment bars suits in federal court by "private parties seeking to impose a liability which must be paid from public funds in the state treasury"), cert. denied, -- U.S. --, 114 S. Ct. 1071 (1993); Bolden v. Southeastern Penn. Trans. Auth., 953 F.2d 807, 818 (3rd Cir. 1991) (en banc) (issue is "whether any judgment would be required to be paid from the state treasury"), cert. denied, -- U.S. --, 112 S. Ct. 2281 (1992); Gary A., 796 F.2d at 945 (state's discretionary decision to indemnify local defendants does not confer immunity); Travelers Indemnity Co. v. School Bd. of Dade County, 666 F.2d 505, 509

(11th Cir. 1982) ("Eleventh Amendment protection is available only if satisfaction of the judgment sought against the state 'agency' must under all circumstances, be paid out of state funds.") (emphasis in original); Boyd v. Tennessee State University, 848 F. Supp. 111, 113 (M.D. Tenn. 1994) ("The touchstone of sovereign immunity applicability is whether a successful action against a defendant would require tapping into the state's treasury for payment of the judgment").[9]

Conversely, the body of Eleventh Amendment law is replete with cases denying claims of immunity because a judgment may be satisfied from non-state funds. In McDonald v. Board of Miss. Levee Commissioners, the Fifth Circuit denied a claim of immunity by a state Levee Board because "McDonald's judgment can be satisfied by the Levee Board itself" due to the Levee Board's taxing power. 832 F.2d 901, 907 (5th Cir. 1987); see also Farias, 925 F.2d at 874-75 (immunity denied where no evidence that state monies used to fund 70 to 80% of the operation of defendant "would be used to pay the judgment"). Similarly, in York v. Jones, a Fourth Circuit district court denied immunity to Medical College of Hampton Roads ("MCRC") because "[t]he Court [was] satisfied that plaintiff's judgment, if any, will not be paid from the state treasury" in light of MCRC's ability to independently acquire property and

[9]Until the panel majority, only a small minority of courts deviated from this view. See Haldeman v. State of Wyoming Farm Loan Bd., 32 F.2d 469, 474 (10th Cir. 1994) (immunity granted where "it is apparent that a monetary judgment would possibly be paid from state funds").

issue bonds without obligating the State. 717 F. Supp. 421, 428-29 (E.D. Va. 1989).[10]

The decision below refuses to consider discretionary non-state sources of income (e.g., taxes and bonds) available to NACTC and dismissed this consideration as a "speculative analysis of whether a college largely funded by the state might be able to pay a judgment in the first instance from other revenue sources[.]" Pet. App. 11a. In so doing, the decision below creates a circuit split by abandoning the requirement that before a defendant is entitled to immunity, it must lack alternative sources of funds from which to satisfy a judgment.

C. The decision below creates a circuit split as to whether a defendant's budgetary shortfall that may be supplemented by state funds at the discretion of the defendant and the State is sufficient to support a finding that the State's purse is affected.

The decision below disregards several discretionary decisions by the defendant and the State to hold that "even if NACTC could initially satisfy a judgment from other [non-state] operating revenues such as tuition payments or federal grants, the judgment would produce a higher operating budget shortfall that must, by state law, be satisfied by an appropriation from the state treasury." Pet App. 8a. By granting immunity to NACTC despite intervening discretionary decisions, the decision below creates a split with six circuits that have denied immunity

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[10]The cases cited in section I.C., infra, also apply this line of analysis, but for the sake of brevity will not be repeated in this section.

when faced with intervening discretionary funding decisions.

Six circuits have considered whether a State's discretionary decision to supplement budgetary shortfalls experienced by entities with the power to levy taxes should be considered to be an impact on the state fisc for Eleventh Amendment purposes. These circuits have unanimously concluded that such discretionary shortfalls are not impact on the state fisc that triggers Eleventh Amendment immunity. See, e.g., Ambus, 995 F.2d at 996-97 (payment of judgment out of state Risk Management Fund and payment of "a substantial portion of the premiums" by state does not trigger immunity where entity has power to levy taxes); Metcalf & Eddy v. Puerto Rico Aqueduct & Sewer Auth., 991 F.2d 935, 941 (1st Cir. 1993) ("We hold, therefore, that a state agency cannot claim Eleventh Amendment immunity solely on the basis that judgments against it may absorb unrestricted funds donated by the state and, in that way, redound indirectly to the depletion of the state's treasury."); Bolden, 953 F.2d at 819 (rejecting defendant's argument that "it might be unable to make up a significant shortfall [due to adverse judgments] and thus might be compelled to rely on increased state subsidies"); Fitchik v. New Jersey Transit Rail Ops., 873 F.2d 655, 661 (3rd Cir.) (rejecting similar argument), cert. denied, 493 U.S. 850 (1989); Kovats, 822 F.2d at 1309 (rejecting similar argument); University of Rhode Island v. A.W. Chesterton Co., 721 F. Supp. 400, 402 (D.R.I. 1989) (state appropriation of funds does not count as impact on state fisc triggering Eleventh

Amendment immunity where funds completely within discretionary control of defendant after appropriated), aff'd, 2 F.3d 1200 (1st Cir. 1993); Vanlaarhoven v. Newman, 564 F. Supp. 145, 149 (D.R.I. 1983) (same); Dyson, 417 F. Supp. at 108-09 ("If the award were to come from student tuition, the state would be under no legal obligation to make good the loss" despite state funding of institution); Gordenstein v. University of Delaware, 381 F. Supp. 718, 721 (D. Del. 1974) (rejecting defendant's argument that shortfall due to adverse judgment would compel reliance on increased state subsidies).[11]

The conflict between the decision below and the decision of the Fifth Circuit in Hander v. San Jacinto Junior College is particularly stark. In Hander, the state had a statutory obligation to make up any budgetary shortfall by

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[11]The circuit split over whether discretionary operating shortfalls must be considered in evaluating the impact on the state fisc parallels another circuit split over whether the impact on the state treasury must be direct or may be indirect. Compare Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 117 (1984) (Eleventh Amendment bars "federal suit against state officials on the basis of state law . . . when . . . the relief sought and ordered has an impact directly on the state itself"); Ambus, 995 F.2d at 996 ("[A]n entity's receipt of some state funding does not mean that damage awards must be considered to have been paid from the state treasury. The proper analysis focuses on whether the damage award would be paid directly by the state treasury, rather than indirectly through commingled state and local funds or state indemnification provisions."); and Dyson, 417 F. Supp. at 107-08 ("In determining whether a particular agency or subdivision is an independent government instrumentality or is the 'alter ego' of the state so as to warrant the cloak of protection afforded by the Eleventh Amendment, the Court must look at whether the funds claimed will, if awarded, directly deplete the state treasury."); with Lewis v. Midwestern State Univ., 837 F.2d 197, 199 (5th Cir. 1988) ("the eleventh amendment is not applicable only where payment would be directly out of the state treasury") (quoting United Carolina Bank v. Board of Regents, 665 F.2d 553, 560 (5th Cir. Unit A 1982)).

appropriating "an amount sufficient to supplement local funds." 519 F.2d 273, 279 (5th Cir. 1975). In Hander, as here, the institution had the power to levy ad valorem property taxes, and satisfaction of the judgment out of local funds (such as existing or increased taxes) would not affect the state contribution. Accordingly, the Fifth Circuit concluded that the institution was not entitled to immunity, and has adhered to this reasoning. See Goss v. San Jacinto Junior College, 588 F.2d 96 (5th Cir. 1979). On virtually identical facts, the Eighth Circuit has granted immunity to NACTC.

Previous cases that have granted immunity because state funds would be required to make up a shortfall have involved entities without the ability to independently raise funds (e.g., levy taxes, charge fees or issue bonds) for their own support. See, e.g., Morris v. Washington Metro Area Transit Auth., 781 F.2d 218, 226 (D.C. Cir. 1986) (Scalia, J. on panel) (granting immunity to WMATA because "[a] judgment against WMATA would necessarily be paid out of WMATA's operating budget and correspondingly increase WMATA's operating deficit" which, because WMATA has no authority to levy taxes, directly affect the treasuries of Maryland and Virginia); Hall v. Medical College of Ohio at Toledo, 742 F.2d 299, 304 (6th Cir. 1984) (state school with no power to tax and limited borrowing authority granted immunity); Jagnandan v. Giles, 538 F.2d 1166, 1176 (5th Cir. 1976) (state school entitled to immunity because budget submitted to legislature for approval and unforeseen expense "compels an expenditure not in the budget"), cert.

denied, 432 U.S. 910 (1977); Perez v. City of Key West, 878 F. Supp. 216, 218 (M.D. Fla. 1995) (community college without power to issue bonds or levy taxes entitled to immunity); Jain v. University of Tenn. at Martin, 670 F. Supp. 1388, 1391 (W.D. Tenn. 1987) (state school with no power to tax and limited borrowing authority granted immunity because in light of state statute and practicality, "any outlay of funds from a source not purely legislative would certainly have an impact upon legislative appropriations"), aff'd, 843 F.2d 1391, cert. denied, 488 U.S. 827 (1988); Thornquest v. King, 626 F. Supp. 486, 492-93 (M.D. Fla. 1985) (Brevard Community College immune because it lacked power to issue bond or levy taxes and thus "a reduction in student funds [to pay a judgment] would require an increase in state funding.").

By ignoring intervening discretionary funding decisions and allowing an indirect effect upon the state fisc to trigger Eleventh Amendment immunity despite alternative non-state funding sources, the decision below creates a conflict with the circuits that have denied immunity where any impact on the state fisc is due to discretionary funding choices and creates additional uncertainty in this important area of the law.

II. This case provides the Court an opportunity to resolve a direct conflict between the circuits and to clarify the appropriate factors to be considered in evaluating whether a single state entity with mixed state and local characteristics, such as a community college, is entitled to Eleventh Amendment immunity as an arm of the state.

A. The decision below exacerbates the existing three way circuit split over the proper factors to be considered in evaluating whether a single state entity with mixed state and local characteristics is entitled to Eleventh Amendment immunity as an arm of the state.

In attempting to apply the distinction between "arms of the state" and political subdivisions, "[t]he Circuit Courts of Appeals have crafted tests that consider anywhere from two to nine factors, which may or may not be based upon the factors enunciated in Lake Country Estates and Mt. Healthy." Rogers, 92 Colum. L. Rev. at 1269. The tests employed by the courts of appeals have resulted in a complete lack of consensus that may, for convenience, be considered a three-way circuit split. One group of courts apply tests based upon a list of nine factors identified in Urbano v. Board of Managers of New Jersey State Prison, 415 F.2d 247 (3rd Cir. 1969), and Krisel v. Duran, 258 F. Supp. 845 (S.D.N.Y. 1966), aff'd per curiam, 386 F.2d 179 (2nd Cir. 1967), cert. denied, 390 U.S. 1042 (1968). The Sixth and Eighth Circuits apply the full nine-factor Urbano/Krisel test; the Third Circuit applies an eight-factor version, and the First Circuit deletes two factors. A second group of courts applies tests derived from Mt. Healthy and/or Lake Country. The Second, Fifth, Tenth and D.C. Circuits have adopted tests that fall within this second category. A third group of courts, including the Fourth, Seventh, Ninth and Eleventh Circuits, have independently formulated tests that differ substantially from either the Urbano/Krisel test or the Mt. Healthy-Lake Country tests.

1. The First, Third, Sixth and Eighth Circuits apply different variations of the Urbano/Krisel test with only the Sixth and Eighth Circuits agreeing on the factors to be considered.

The Sixth Circuit applies a test of nine factors first examined in Krisel and adopted by the Third Circuit in Urbano:

> 1) the university's status and nature under local law and decisions; 2) whether payment of any judgment would come from the state treasury; 3) whether the university has the funds or power to satisfy the judgment; 4) whether the university is performing a governmental or proprietary function; 5) whether the university has been separately incorporated; 6) the degree of autonomy the university has over its operations; 7) whether the university has the power to sue and be sued and to enter into contracts; 8) whether university property is immune from state taxation; and 9) whether the state has immunized itself from responsibility for the university's actions.

Jain, 670 F. Supp. at 1389. In Sherman, 16 F.3d at 865 n.6, the Eighth Circuit also approved this nine factor test.

The Third Circuit has adopted an eight factor test that rearranges the Urbano/Krisel factors and eliminates the distinction between governmental and proprietary functions:

> [1a] whether payment will come from the state treasury, [1b] whether the agency has the money to satisfy the judgment, [1c] whether the sovereign has immunized itself from responsibility for the agency's debts[]; . . . [2a] how state law treats the agency generally, [2b] whether the agency is separately incorporated, [2c] whether the agency can sue and be sued in its own right, [2d] whether it is immune from state taxation[]; [and] [3] [w]hat degree of autonomy the agency has.

Bolden, 953 F.2d at 816.

The First Circuit also uses a variant of the Urbano/Krisel test that omits the third and fifth factors, leaving seven factors:

> [1] local law and decisions defining the agency involved; [2] whether payment of any judgment will come out of the state treasury; [3] whether the agency is performing a governmental or proprietary function; [4] the agency's degree of autonomy; [5] the power of the agency to sue and be sued and enter into contracts; [6] whether the agency's property is immune from state taxation and [7] whether the state has insulated itself from responsibility for the agency's operations.

Puerto Rico Ports Auth. v. M/V Manhattan Prince, 897 F.2d 1, 9 (1st Cir. 1990).

2. The Second, Tenth and D.C. Circuits apply tests derived from Lake Country or Mt. Healthy.

Although the first court to use the Krisel factors was a New York district court, the Second Circuit has applied the factors elucidated in Lake Country:

> (1) whether the document or law creating the agency refers to the agency as a political subdivision of the state; (2) the degree of state control over appointments to the governing body of the agency; (3) whether the agency's funding is provided by the state or political subdivisions; (4) whether the agency was engaged in governmental or proprietary functions; (5) the degree of autonomy from the state; and (6) whether the agency's obligations are binding on the state.

Feeney v. Port Authority Trans-Hudson Corp., 873 F.2d 628, 630-31 (2nd Cir. 1989), aff'd, 495 U.S. 299 (1990).

The Tenth Circuit has remained committed to the

original Mt. Healthy factors:

> (1) the characterization of the [agency] under state law; (2) the guidance and control exercised by the state over the [agency]; (3) the degree of state funding received by the [agency]; and (4) the [agency's] ability to issue bonds and levy taxes on its own behalf.

Ambus, 995 F.2d at 994 (citing Mt. Healthy, 429 U.S. at 280).

The D.C. Circuit has merged the Mt. Healthy and Lake Country factors into a single test:

> (1) whether "judgment [against the agency] would have the same practical effect as a judgment against the state"; (2) state law classification of the agency as part of the state or a political subdivision; (3) degree of guidance and funding received by the agency from the state; (4) ability of agency to levy taxes and issue bonds.

Morris, 781 F.2d at 223-24.

3. The Fourth, Fifth, Seventh, Ninth and Eleventh Circuits apply "independent" tests that differ from the Urbano/Krisel test the Mt. Healthy-Lake Country tests applied by other circuits.

In addition to the two groups of courts that apply tests based on factors recognized in prior cases, several circuits have created tests independently. Although the tests share some common factors (such as whether a judgment will affect the state treasury), they are remarkably diverse. The Fourth Circuit considers four factors:

> (1) "whether the state treasury will be responsible for paying any judgment that might be awarded", (2) "whether the entity exercises a significant degree of autonomy from the state, [3] whether it is involved in local versus statewide concerns, and [4] how it is treated as a matter of state law."

Ram Ditta v. Maryland National Capital Park & Planning Comm'n, 822 F.2d 456, 457-58 (4th Cir. 1987).

The Fifth Circuit has adopted a six part test:

> (1) whether state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use the property.

Farias, 925 F.2d at 874.

The Seventh Circuit also considers four factors, although not the same four considered by the Fourth Circuit:

> (1) "whether a judgment would deplete the state treasury", "[2] whether the state entity can sue and be sued, [3] whether it performs an essential government function; and [4] whether it enjoys a substantial degree of political independence from the state."

Benning v. Board of Regents of Regency Universities, 928 F.2d 775, 777 (7th Cir. 1991).

The Ninth Circuit considers five factors:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central government functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Doe v. Lawrence Livermore Nat'l Lab., 65 F.3d 771, 774 (9th Cir. 1995).

Finally, the Eleventh Circuit employs three factors and a presumption. This court examines:

> (1) how the state law defines the entity; (2) the degree of state control over the entity; and (3) the agency's fiscal autonomy -- i.e., where the entity derives its funds and who is responsible for judgments against the entity.

Stewart v. Baldwin Board of Ed., 908 F.2d 1499, 1509 (11th Cir. 1990). Unique to the Eleventh Circuit is a presumption that "when the agency's budget is submitted to the state legislature for approval, it is presumed for purposes of the last two factors that the entity is an agency of the state." Id.

4. The ill-defined and general factors of the conflicting tests result in uncertain law and intracircuit splits.

Although the various tests have been presented as the established law of the respective circuits, even this modicum of agreement is illusory. Intracircuit disagreements abound over the weight to be accorded specific factors. See, e.g., Rogers, Colum. L. Rev. at 1271 n. 139. Intracircuit disputes have also erupted over the status of particular entities. Compare Weller v. Department of Social Servs. for Baltimore, 901 F.2d 387, 398 (4th Cir. 1990) (not immune) with Davis v. Department of Social Servs., No. 90-1864, 1991 WL 157258 at *3 (4th Cir. Aug. 9, 1991) (immune). Intracircuit splits even exist concerning the proper test to be applied.[12] Compare Sherman, 16 F.3d at 865 n.6 (endorsing Urbano/Krisel test); with Barkett, Levy & Fine,

[12]Perhaps some of this confusion stems from the rapid and constant change in this area of the law. For example, Third, Fifth and Tenth Circuits have revised their tests in the intervening four years since the Rogers article went to press. The Eighth Circuit has done so twice, and the Eleventh Circuit has created an intracircuit split.

Inc. v. St. Louis Thermal Energy Corp., 948 F.2d 1084, 1086 (8th Cir. 1991) (using Lake Country test); and Greenwood, 778 F.2d at 453 (adopting two part test).

B. The decision below illustrates the conflicting results generated by the conflicting tests.

Although the amorphous nature of the factors in these tests renders some apparent differences illusory, many differences between the tests are real, and application of these varying tests has generated conflicting results. On at least two occasions, a single entity has been held to be an arm of the state and immune from suit in one circuit, while simultaneously being held to be a mere municipality that is not immune from suit in a neighboring venue.[13] Compare Dykman v. New Jersey Transit Rail Ops., 685 F. Supp. 79, 80 (S.D.N.Y. 1988) (New Jersey Transit Authority immune from suit) with Fitchik, 873 F.2d at 664 (applying variant of Urbano/Krisel test to hold New Jersey Transit Authority not immune from suit); and compare Feeney, 873 F.2d at 633 (applying Lake Country test to hold Port Authority of New York and New Jersey not immune from suit), with Port Auth. Police Benevolent Ass'n v. Port Auth., 819 F.2d 413, 418 (3rd Cir.), cert. denied, 484 U.S. 953 (1987) (applying Lake County-Urbano test to hold Port Authority of New York and New Jersey immune from suit).

The decision below is an even more egregious example of the conflict created by variant tests. In its original order, the

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[13]One of these conflicts necessitated a resolution by this Court. See Feeney, 499 U.S. at 303-04.

district court relied upon Parsons, which had applied a mixture of Mt. Healthy and a variant of the Fifth Circuit test, to conclude that NACTC was not immune from suit. Pet. App. 55a. NACTC appealed, and the Eighth Circuit remanded to the same judge who considered the same facts (and a virtually unchanged record), but reached the opposite conclusion. Pet. App. 53a. As the dissenters from both the panel majority opinion and the order denying rehearing en banc point out, the panel majority affirmed the district court, paying lip service to Sherman, but largely ignoring it in favor of the two part test in Greenwood.[14] In essence, NACTC was determined not to be immune under a Mt. Healthy test, but held to be immune under the two part Greenwood test. This conflict between the variant tests is the most crystallized of a more pervasive pattern of conflicting results.

The panel majority creates a conflict among the circuits because numerous circuits have applied various tests to educational institutions with less power to raise independent funding and less statutory autonomy and have concluded that these institutions are not immune from suit. The First Circuit applied its variant of the Urbano/Krisel test to conclude that the

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[14]It is unclear whether the test that was actually applied by the district court on remand was derived from Greenwood or Sherman. Although the Sherman test (the Urbano/Krisel test) is stated in the opinion of the district court, the body of the opinion is structured according to the two pronged test in Greenwood. Similarly, although the panel majority frequently refers to Sherman, it makes no mention of the Urbano/Krisel factors endorsed in Sherman and conducts its analysis under the two pronged test in Greenwood.

University of Rhode Island is not immune because it "has exclusive control over the emoluments which it receives from sources other than public coffers." Vanlaarhoven, 564 F. Supp. at 149; accord Univ. of Rhode Island, 721 F. Supp. at 400.

The Third Circuit has also applied a variation of the Urbano/Krisel test to several institutions, finding them not to be immune because of their abilities to independently raise funds through tuition, bonds or taxes. Kovats, 822 F.2d at 1308-09 (Rutgers not immune because despite receipt of 50 to 70% of general operating account from state, it has substantial non-state funds); Fuchilla v. Prockop, 682 F. Supp. 247, 253-54 (D.N.J. 1987) (Univ. of Medicine and Dentistry in New Jersey not immune); Gordenstein, 381 F. Supp. at 721 (Univ. of Delaware not immune because any judgment paid by university which has power to raise funds by issuing bonds); Samuel, 375 F. Supp. at 1127 (Pitt, Temple and Penn State not immune because they have ability to raise funds by issuing bonds).

The Fourth Circuit has also applied these principles to educational institutions with the power to raise funds independently and determined that such institutions are not immune from suit. York, 717 F. Supp. at 428-29 (Medical College of Hampton Roads, which has ability to issue bonds for which it, and not state, is liable, not immune); Dyson, 417 F. Supp. at 108-09 (funding via bonds, donations and fees sufficient to defeat immunity for Virginia Polytechnic Institute).

In Hander, the Fifth Circuit examined the funding mechanisms for San Jacinto Junior College, concluding that this

junior college which possessed the power to issue revenue bonds and levy taxes was subject to suit. 519 F.2d at 279-80. In Gardetto v. Mason, a district court in the Tenth Circuit compared the community college to the school district in Mt. Healthy and concluded that because the community college had authority to charge fees and issue bonds, it was subject to suit. 854 F. Supp. 1520, 1543-44 (D. Wyo. 1994).

Although the details of the tests and the statutory relationships between the educational institution and the state vary in these cases, the consensus of the case law is clear -- the ability of an institution to raise revenue independent of the state fisc and the availability of these funds to meet the potential liability of a federal court judgment is the predominant factor in Eleventh Amendment analysis. The decision below creates a conflict with this well-established body of Eleventh Amendment jurisprudence.

Conclusion

The petitioner respectfully requests this Court to grant the Writ of Certiorari and review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

James G. Lingle,
Counsel of Record
LINGLE LAW FIRM
5 Halsted Circle
Rogers, Arkansas 72757
501-636-7899

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

No. _____

LES HADLEY,
Petitioner,

v.

NORTH ARKANSAS COMMUNITY
TECHNICAL COLLEGE,
Respondent.

PETITIONER'S APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-3703

Les Hadley,	*	
	*	
Plaintiff - Appellee,	*	
	*	**Appeal from the United States**
v.	*	**District Court for the**
	*	**Western District of Arkansas.**
North Arkansas Community	*	
Technical College,	*	
	*	
Defendant - Appellant.		

Submitted: September 11, 1995

Filed: February 14, 1996

Before LOKEN and LAY, Circuit Judges, and NANGLE,* District Judge.

*The HONORABLE JOHN F. NANGLE, United States District Judge for the Eastern District of Missouri, sitting by designation.

LOKEN, Circuit Judge.

Les Hadley filed this civil rights action under 42 U.S.C. § 1983 alleging that his former employer, North Arkansas Community Technical College ("NACTC"), violated his due process rights by summarily terminating him as a vocational

instructor. NACTC moved for summary judgment, claiming that it is an arm of the State entitled to Eleventh Amendment immunity from this federal court damage action. The district court[1] denied the motion, and we remanded for further consideration in light of Sherman v. Curators of Univ. of Mo., 16 F.3d 860 (8th cir. 1994), and Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1985). The court then concluded in a thorough opinion that NACTC is entitled to Eleventh Amendment immunity and dismissed Hadley's claim. Hadley appeals. We affirm.

I.

The Eleventh Amendment immunizes an unconsenting State from damage actions brought in federal court, except when Congress has abrogated that immunity for a particular federal cause of action. See generally Edelman v. Jordan, 415 U.S. 651 (1974). Section 1983 does not override Eleventh Amendment immunity. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 63 (1989), construing Quern v. Jordan, 440 U.S. 332 (1979). Therefore, if NACTC is entitled to the State of Arkansas's Eleventh Amendment immunity, the district court properly dismissed Hadley's claim.

A state agency or official may invoke the State's Eleventh Amendment immunity if immunity will "protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State

[1] The HONORABLE H. FRANKLIN WATERS, Chief Judge, United States District Court for the Western District of Arkansas.

itself." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 123 n.34 (1984), quoting Lake County Estates, Inc. v. Tahoe Reg. Planning Agency, 440 U.S. 391, 401 (1979); see Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 463-64 (1945). On the other hand, Eleventh Amendment immunity does not extend to independent political subdivisions created by the State, such as counties and cities. See Lincoln County v. Luning, 133 U.S. 529 (1890). The issue is whether NACTC "is to be treated as an arm of the State . . . or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (holding that Ohio local school districts are like political subdivisions and therefore not immune). State universities and colleges almost always enjoy Eleventh Amendment immunity.[2] On the other hand, community and technical colleges often have deep roots in a local community. When those roots include local political and financial involvement, the resulting Eleventh Amendment immunity questions tend to be difficult

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[2]For cases involving Eighth Circuit institutions, see Dover Elevator Co. v. Arkansas State Univ., 64 F.3d 442, 446-47 (8th Cir. 1995); Richmond v. Board of Regents of Univ. of Minn., 957 F.2d 595, 599 (8th Cir. 1992); Sherman v. Curators of Univ. of Mo., 871 F. Supp. 344, 345 (W.D. Mo. 1994); Van Pilsum v. Iowa State Univ. of Science Tech., 863 F. Supp. 935, 937 (S.D. Iowa 1994); Assaad-Faltas v. University of Ark. for Medical Sciences, 708 F. Supp. 1026, 1030 (E.D. Ark. 1989), aff'd, 902 F.2d 1572 (8th Cir.), cert. denied, 498 U.S. 905 (1990). A fact specific exception to the general rule is Kovats v. Rutgers, the State Univ., 822 f.2D 1303, 1307 (3d Cir. 1987).

and very fact specific.[3]

Eleventh Amendment immunity reflects respect for state sovereignty and a desire to protect the state treasury. A narrow majority of the Supreme Court recently held that exposure of a state treasury is a more important factor than whether the State controls the entity in question. Hess v. Port Auth. Trans-Hudson Corp., 115 S. Ct. 394 (1994). We see nothing inconsistent with the majority's reasoning in Hess and the approach we have developed for deciding whether a particular institution of higher learning is entitled to Eleventh Amendment immunity. In addition, Hess involved a bi-State compact entity, and the majority cautioned that "there is good reason not to amalgamate Compact Clause entities with agencies of 'one of the United States' for Eleventh Amendment purposes." Id. at 402. Therefore, we adhere to the test that we instructed the district court to apply on remand, which requires that we

> examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state. Courts typically look at the degree of local autonomy and control and most importantly whether the funds to pay any award will be derived from the state treasury.

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[3]See, e.g., Mitchell v. Los Angeles Community College Dist., 861 F.2d 198, 201-202 (9th Cir. 1988), cert. denied, 490 U.S. 1081 (1989); Goss v. San Jacinto Junior College, 588 F.2d 96, 98-99 (5th Cir.), modified on other grounds, 595 F.2d 1119 (5th Cir. 1979); Korgich v. Regents of New Mexico Sch. of Mines, 582 F.2d 549, 551 (10th Cir. 1978); Durrani v. Valdosta Technical Inst., 810 F. Supp. 301, 305 (M.D. Ga. 1992), aff'd, 3 F.3d 443 (11th Cir. 1993); Moche v. City Univ. of New York, 781 F. Supp. 160, 165-66 (E.D.N.Y. 1992), aff'd, 999 F.2d 538 (2nd Cir. 1993); Thornquest v. King, 626 F. Supp. 486, 488-89 (M.D. Fla. 1985).

Greenwood v. Ross, 778 F.2d 448, 453 (8th Cir. 1985), quoting Laje v. R.E. Thomason Gen. Hosp., 665 F.2d 724, 727 (5th Cir. 1982) (citations omitted in original).

II.

Like the district court, we begin by examining "the nature of the entity created by state law." Mt. Healthy, 429 U.S. at 280; see Seibert v. University of Okla. Health Sciences Ctr., 867 F.2d 591, 594-95 (10th Cir. 1989). Amendment 52 to the Arkansas Constitution authorizes the General Assembly to establish community colleges, and to certify proposed community college districts. See Ark. Code Ann. §§ 6-61-505 to -510. A district is created if a majority of the voters in the proposed district vote in favor of establishing the community college. § 6-53-301(a) (Supp. 1993). That law prompted the 1992 merger of North Arkansas Community College and Twin Lakes Technical College into NACTC.

By statute, the State must provide community colleges "[f]unds for the general operation of an adequate comprehensive educational program." Ark. Code Ann. § 6-61-601(a). To this end:

> The amount of state revenues to be recommended for the general operation of each community college shall be the difference between the recommended budget and the total of income for general operation, including student fees and any other income except local taxes. The recommended budget for general operation shall be sufficient to provide an adequate comprehensive educational program. . . as determined by the [State Board of Higher

Education].

§ 6-61-601(c)(2). For purposes of state appropriation and expenditure procedures, the term "State agency" includes "state-supported institutions of higher learning . . . functioning under appropriation made by the General Assembly." § 19-4-801(1)(A). For the 1993-94 fiscal year, 58.2% of NACTC's total budget was provided by state funds appropriated by the General Assembly. Moreover, the state treasury is structured to include an NACTC Fund that is dedicated to the "maintenance, operation, and improvement" of NACTC. § 19-5-303(m) (Supp. 1993).

To this point, it seems clear that NACTC is, both financially and institutionally, an arm of the State, and that any damage award to Hadley would inevitably be paid from the state treasury. Those are the factors that led us to conclude in Dover Elevator, 64 F.3d at 446-47, that Arkansas State University is entitled to Eleventh Amendment immunity. But Arkansas community colleges also have elements of local funding and control that require further analysis.

The Arkansas Constitution permits community colleges to be partially funded at the local level:

> The General Assembly shall prescribe the method of financing such community college and technical institutes, and may authorize the levy of a tax upon the taxable property in such districts for the acquisition, construction, reconstruction, repair, expansion, operation, and maintenance of facilities therefor.

Amendment 52, § 1. The General Assembly had made local financial participation mandatory:

> (a) Each community college district shall be responsible for all capital outlay expenses[4] . . . except that the state may share the responsibility for capital outlay expenses for any community college which has an enrollment of at least one thousand (1,000) full-time equivalent students . . .
>
> (b) Capital outlay expenses shall be paid from gifts, grants, profits from auxiliary enterprises, tuition, fees, local millage, and other local funds and may be paid from state funds appropriated for such purposes.

§ 6-61-603 (Supp. 1993). Therefore, when the voters of Boone County, Arkansas, voted in 1973 to establish NACTC's community college district, they authorized the levy of a tax not to exceed five mills on taxable property in the district "for the purchase of land and for the construction and furnishing of buildings and facilities for such college." That authority was extended indefinitely in a special election in 1977. However, while local tax revenues have financed NACTC buildings and improvements, those funds are subject to most state accounting and budgetary procedures. § 19-4-803(b)(2); NACTC is a "State agency" for purposes of the Arkansas State Building Services Act, § 22-3-102(5); and the campus is State owned.

In fiscal 1993-1994, NACTC received $317,366 in local

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[4]Essentially, expenditures for land, buildings, and furniture and equipment. See § 6-61-501(2).

tax revenues, some three percent of its total budget. Those funds were dedicated to new acquisitions or the issuance of bonds to finance new acquisitions. See § 19-4-803(b)(2) (college must use funds from a millage levy "for the purposes stated on the ballot at the time of the election authorizing the millage"); Ark. Const. Art. 16, § 11 ("no moneys arising from a tax levied for one purpose shall be used for any other purpose"). Although the General Assembly has authorized community college districts to levy for general college operations "[i]n the event the local board of community college wishes to spend larger sums of money that the state funds provided for general operation," § 6-61-602(a), *NACTC has never received any funds for general operations from local tax levies.* In fiscal 1993-1994, NACTC's operating expense[5] revenues were 75.1% state appropriated funds, 22.1% tuition payments, and 2.8% federal grants and private donations.

In these circumstances, we conclude that Hadley's claim "is in reality a suit against the state," Sherman, 16 F.3d at 863, because "the funds to pay any award will be derived from the state treasury," Dover Elevator, 64 F.3d at 446. Hadley argues that he seeks damages of less than $250,000 and therefore any award could be paid from other sources, such as future local tax increases, tuition, federal grants, or other discretionary funds.

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[5] "Operating expenses" include "funds devoted to or required for the regular or ordinary expense of the college, including administrative, maintenance, and salary expenses, but excluding capital outlay expenses, student activity expenses, and expense for intercollegiate athletics." § 6-61-501(3) (Supp. 1993); see also § 6-53-103(9) (Supp. 1993).

However, while there is dictum in Sherman suggesting it is relevant "whether a judgment against the University can be paid from non-state funds under the University's discretionary control," 16 F.3d at 865 (emphasis added), traditional Eleventh Amendment cases did not require a speculative analysis of whether a college largely funded by the State might be able to pay a judgment in the first instance from other revenue sources, and Greenwood and Sherman were not departures from prior Eleventh Amendment jurisprudence. See Treleven v. University of Minnesota, No. 95-2019, 1996 WL 11102, at *2 (8th Cir. Jan. 12, 1996). Mt. Healthy directs us to examine "the nature of the entity," 429 U.S. at 280, not the nature of the relief the plaintiff seeks.

Arkansas calls NACTC a state agency[6] and has made its daily operations financially dependent upon the state treasury. the district's never-exercised authority to supplement NACTC's operating budget with limited local tax revenues[7] does not change the fact that the State has created an institution of higher learning "that is dependent upon and functionally integrated with the state treasury." Kashani v. Purdue Univ., 813 F.2d 843, 846 (7th Cir.), cert. denied, 484 U.S. 846 (1987).

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[6]Arkansas has also characterized NACTC as a "state agency" in other governmental contexts. For example, the Department of Finance and Administration determined that community colleges are state agencies for purposes of exempting them from taxation, and the Attorney General determined that they are state agencies that qualify for grants from the Natural and Cultural Resources Grants and Trust Fund.

[7]The total local tax that may be levied for community college purposes is ten mills. § 6-61-503(a).

The relevant funding inquiry cannot be whether NACTC enjoys some non-state funding, such as user fees (tuition), because then most state departments and agencies, and all state universities, would be denied Eleventh Amendment immunity.[8] Here, even if NACTC could initially satisfy a judgment from other operating revenues, such as tuition payments or federal grants, the judgment would produce a higher operating budget shortfall that must, by state law, be satisfied by an appropriation from the state treasury. Thus, Hadley's action "is in essence one for the recovery of money from the state." Ford Motor, 323 U.S. at 463-64.

III.

Moving from the critical subject of state funding to the less important question of state control, we agree with the district court that there is substantial, but far from total, state control over NACTC. The State Board of Higher Education is comprised of thirteen members appointed by the governor and confirmed by the Senate. § 6-61-201(a)(1) (Supp. 1993). The State Board acting as the State Community College Board has broad powers and duties to guide and regulate community colleges. Ark. Code Ann. §§ 6-61-501(5) (Supp. 1993), 6-61-505. The College Panel of the State Board participates actively

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[8]Accord Lewis v. Midwestern State Univ., 837 F.2d 197, 199 (5th Cir.), cert. denied, 488 U.S. 849 (1988); Van Pilsum, 863 F.Supp. at 937-38. Conversely, the inquiry cannot end with the fact that the State appropriates funds for a community college, because then most local school districts would also be Eleventh Amendment immune. See Mt. Healthy, 429 U.S. at 280.

and widely in NACTC's day-to-day operation. For example, the College Panel establishes minimum qualifications for the college president, § 6-53-203(3) (Supp. 1993); evaluates NACTC budget requests, §§ 6-53-203(4) (Supp. 1993); 6-61-601; develops budget forms and determines that state funds are properly spent, §§ 6-53-203(5), (6) (Supp. 1993), 6-61-209;' determines minimum tuition and fee levels, §§ 6-53-203(7) (Supp. 1993), 6-53-208 (Supp. 1993), 6-61-215; recommends establishing, expanding, or abolishing institutions, § 6-53-203(9) (Supp. 1993); and reviews curriculum proposals and changes, §§ 6-53-203(d) (Supp. 1993), 6-61-214 (Supp. 1993). The State Board also approved the merger of North Arkansas Community College and Twin Lakes Technical College into NACTC, the college's name change, and the its [sic] degree programs and courses.

However, the General Assembly has also granted substantial control over NACTC's daily affairs to locally-elected officials. NACTC has a Local Board of nine qualified electors of the community college district who are elected on a nonpartisan basis for six-year terms. § 6-61-520 (Supp. 1993). The Local Board, with the advice of the State Board, has broad power to select college officers; develop NACTC's education program; appoint a college president and fix the president's compensation and terms of office; appoint members of the administrative and teaching staffs and fix their compensation and terms of employment; enter into contracts; accept grants and contributions; acquire, own, lease, use and operate property; and exercise the right of eminent domain. § 6-61-521.

Thus, as the district court noted, NACTC with its Local Board is significantly more autonomous than Arkansas state-wide universities. On the other hand, when it comes to finances -- the essence of the Eleventh Amendment inquiry -- the State Board's ultimate authority is ensured by its power to withhold state funding if NACTC fails to comply with "prescribed standards of administration or instruction." § 6-53-105 (Supp. 1993).

Read together, the provisions delimiting the responsibility of the State and Local Boards reveal a community college system that blends state and local interests and authorities. The local control is of course relevant but falls short, in our view, of making NACTC the Eleventh Amendment equivalent of a political subdivision. In the final analysis, while Eleventh Amendment immunity is a question of federal law, the structuring of state government is the province of the States. Nothing precludes a State from delivering regional or even local governmental services through an arm of the State, from permitting voters in an affected locale to help staff a state agency, or from providing highly structured local input to state agency decisionmaking.[9]

The judgment of the district court is affirmed.

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[9]For example, most local school districts do not enjoy Eleventh Amendment immunity because they are dependent on local taxes and controlled by local governmental entities, like cities and counties. However, California has chosen to structure its public education entities so that all have Eleventh Amendment immunity. See Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 251-52 (9th Cir. 1992), cert. denied, 113 S. Ct. 1280 (1993).

LAY, Circuit Judge, dissenting.

Today's decision amplifies the disarray of approaches applied by lower courts when confronted with the defense of Eleventh Amendment immunity by state-created entities. Little would be served by setting forth the diverse reasoning of this Court or other courts. These cases are already of historical record.[1] My disagreement with the majority opinion is that it is not faithful to Supreme Court precedent or to this Court's rulings covering the same issue.

Local Control

On June 5, 1995, we remanded this case to make a complete record as to "'local autonomy and control and most importantly, whether the funds to pay any award will be derived from the state treasury.'" Hadley v. North Arkansas Community Technical College, No. 94-3703, 1995 WL 329591, at *1 (8th Cir. June 5, 1995) (per curiam) (quoting Greenwood v. Ross, 778 F.2d 448, 453 (8th Cir. 1985) (quoting Laje v. R.E. Thomason Gen. Hosp., 665 F.2d 724, 727 (5th Cir. 1982); see Sherman v. Curators of Univ. of Mo., 16 F.3d 860, 863 (8th Cir. 1994)). Subsequent to our remand, the Supreme Court issued its ruling in Hess v. Port. Auth. Trans-Hudson Corp., 115 S. Ct. 394 (1994). As the Court therein observed, the issue of ultimate control cannot be the determining factor in Eleventh

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[1]See Note, Clothing Sate Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the State Doctrine, 92 Colum. L. Rev. 1243, 1291-96 (1992) (collecting cases).

Amendment cases, "for the State may destroy or reshape any unit it creates." 115 S. Ct. at 404. The majority concedes that NACTC possesses a high level of local autonomy, but erroneously discount this factor because the state legislature calls NACTC a "state agency" and "provides ultimate state control." Maj. Op. at 10.

I read the record much differently. In my judgment, the record reveals that NACTC resembles a local school district, albeit subject to state guidance, whose Local Board possesses broad authority to direct the college educational program and apply the college's resources to that end. The Local Board has broad power over the direction of NACTC's educational program. Specifically, the Local Board is empowered, inter alia, to: (1) select its officers; (2) develop, with the advice of the State Board, a president and fix the compensation and terms of office of the president who shall be the executive officer of the college's Local Board; (4) appoint, upon nomination of the president, members of the administrative and teaching staffs and fix their compensation and terms of employment; (5) enter into contracts; (6) accept grants or contributions of money to be used for any of its purposes; (7) acquire, own, lease, use, operate and dispose of property; (8) exercise the right of eminent domain; (9) make rules and regulations to govern the college's administration and operation; and (10) exercise all other necessary powers to operate the college. Ark. Code Ann. § 6-61-521 (1987).

Thus, viewed in light of the authority of the Local

Board, the State Board's role is more appropriately characterized as that of an advisor, rather than that of a regulator. As the district court acknowledged, for example, NACTC is significantly more autonomous than Arkansas's universities. Dist. Ct. Op. at 19. NACTC has the power to tax, to acquire, use, and own property in the college's name, and to govern itself locally.

Stated differently, I find merit in Hadley's contentions that the State Board's supervision of NACTC is not appreciably different from that it exercises over local school boards. Although the state approves NACTC decisions with respect to educational policy, many if not most of them are initiated at the local level. For example, while the consolidation of North Arkansas Community College and Twin Lakes Technical College was subject to state approval, NACTC's Local Board, and not the General Assembly or the State Board, initiated that decision. The same is true of the college's curricular decisions. Thus, although state law governs several administrative aspects of the college's operations, substantive judgments concerning NACTC's educational policy are made locally. In sum, a thorough analysis of NACTC's local control supports the conclusion that NACTC may not invoke the Eleventh Amendment's protection.

NACTC's Financial Relationship with the State of Arkansas

The Supreme Court observed in Hess, however, that control cannot be dispositive since it does not "hone in on the

impetus for the Eleventh Amendment: the prevention of federal court judgments that must be paid out of a state's treasury." 115 S. Ct. at 404. Rather, the "core concern" in Eleventh Amendment analysis is whether a judgment against NACTC must be satisfied from the state treasury. Id. at 406.

The means by which NACTC acquires funding is established by Arkansas constitutional and statutory law. Amendment Fifty-two to the Arkansas Constitution empowers the General Assembly to establish districts to furnish community college instruction and technical training.[2] Ark. Const. amend. 52. Specifically, Amendment Fifty-two provides that "[t]he General Assembly shall prescribe the method of financing such community college and technical institutes, and may authorize the levy of a tax upon the taxable property in such districts for the acquisition, construction, reconstruction, repair, expansion, operation, and maintenance of facilities therefor." Id., §1. The Amendment also provides, however, that no such district shall be created and no tax levied without the approval of a majority of the qualified voters in the

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[2]Arkansas statutory law thus defines community college:

> an educational institution established or to be established by one (1) or more counties or cities of this state offering a comprehensive program designed to serve the postsecondary educational needs of its district and the state including specifically, but without limitation, occupational programs of varying types and levels of difficulty, the first two (2) years of a baccalaureate degree, community service offerings, and student guidance and counseling services . . . .

Ark. Code Ann. § 6-61-501(a) (Supp. 1993).

proposed district. Id., § 2. Thus, the creation of a community college district is a joint venture between the state of Arkansas and the local community.

The Arkansas General Assembly has fulfilled its constitutional mandate by legislating that "[f]unds for the general operation of an adequate comprehensive educational program shall be provided by the state." Ark. Code Ann. § 6-61-601(a) (1987). In the event the college wishes to spend larger sums of money, it may raise additional "general operation" monies by levying millage. § 6-61-602(a). Local millage is subject to approval by the local electorate, § 6-61-601(b), is limited to ten mills on the taxable real and personal property in the district, § 6-61-517(b), and is a continuing levy to be collected by county authorities in the manner provided by law, § 6-61-517.

NACTC has far greater discretion in its management of monies received from nonstate sources. Bequests, gifts, and donations are exempted from state accounting and budgetary procedures, § 19-4-803, as are monies received from millage levied by the local district, § 19-4-803(b)(1-2). NACTC may not use millage revenues, however, for purposes other than those stated on the ballot. Dist. Ct. Op. at 20-21.[3]

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[3]NACTC has submitted the issue of funding to the local electorate on two occasions. In 1983, area voters passed a ballot ("the 1983 ballot") authorizing the creation of the community college district and the levy of a tax on the assessed value of taxable property therein. The 1973 ballot authorized a tax not to exceed five mills on the dollar "for the issuance of bonds to provide all or part of the funds for the purchase of land and for the construction and furnishing of buildings and facilities for such college."

As I read the majority opinion, it adopts an "impact" rule, which apparently reasons that, since the school's general operations are funded primarily by the state, any judgment paid by NACTC "would produce a higher operating budget shortfall that must, by state law, be satisfied by an appropriation from the state treasury."[4] Maj. Op. at 8.

I respectfully must disagree with this reasoning. On the record presented here, it is clear that NACTC has independent discretionary power to raise funds for educational purposes and payment of money judgments. As the Court in Hess stated: "If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is 'no' -- both legally and

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Dist. Ct. Op. at 11 (quoting the 1973 ballot). In 1977, area voters passed a second ballot ("the 1977 ballot") which extended the bonding authority of the district and reauthorized the tax. By its terms, the 1977 ballot authorized the issuance of bonds "for the purpose of liquidating the District's presently outstanding bonded indebtedness (incurred to finance construction and furnishing of buildings and facilities for the College) and the purpose of providing all or part of the funds for the construction and furnishing of additional buildings and facilities for the college." Id. (quoting the 1977 ballot).

[4]The majority's reliance upon Dover Elevator Co. v. Arkansas State University, 64 F.3d 442 (8th Cir. 1995), is misplaced. In Dover, the University had no discretionary power independently to raise revenue, as NACTC has. The record in Dover revealed that Arkansas State University could not "spend one penny without appropriation to do so from the general assembly." Id. at 447 (quoting undisputed testimony in the record); see also id. ("because any award against ASU must be appropriated by the state assembly from money under state control, . . . the district court did not err in finding that ASU shares in the state's Eleventh Amendment immunity" (emphasis added)).

practically -- then the Eleventh Amendment's core concern is not implicated." 115 S. Ct. at 406.

The record in this case reveals that the state is not required, legally or practically, to indemnify NACTC for debts incurred as a result of locally generated bond revenues. Arkansas law states quite the opposite: "The bonds shall be revenue bonds secured solely by the revenues pledged thereto, and in no event shall they be considered a debt for which the faith and credit of the State of Arkansas or any of its revenues are pledged." Ark. Code Ann. § 6-61-1009 (Michie Supp. 1993). Thus, it is clear the Eleventh Amendment's dominant concern is not implicated.

Moreover, although the district court found that local tax funds amount to an insignificant percentage of NACTC's overall budget, Hadley is correct in asserting that NACTC might authorize an additional levy of up to ten mils, ear-marking it for provision of general operating funds. Dist. Ct. Op. at 11-12. Thus, it is not the case that an award of backpay or nominal damages, assuming Hadley were to prevail, "would necessarily implicate the sate fisc." Sherman, 16 F.3d at 864. I find this factor significant. The power to levy taxes is not, as NACTC suggests, merely incidental, but rather suggests the college is not exclusively dependent upon the state.

Alternatively, Hadley suggests that NACTC has other sources of discretionary funding, such as tuition, federal grants, private donations, and "other" monies, from which a judgment against him could be paid. NACTC correctly replies that, like

funds from local millage, these funds may only be used for specific, limited purposes. Tuition monies, for example, are dedicated to the payment of "educational" expenses. Dist. Ct. Op. at 12. But the fact that these monies are dedicated solely to "educational" expenses does not necessitate the conclusion that an award of back-pay to an instructor is not such an expense. Hadley suggests, quite persuasively, that the payment of an instructor's salary constitutes "the quintessential educational expense," Supp. Br. for Appellee at 10, and asserts that the reduction of these expenses to the form of a judgment does not render them non-educational, id. I agree. Although the district court concluded otherwise, I find no expressed rationale supporting that conclusion. The monies involved here, if damages were to be awarded, constitute back salary for an instructor. These are clearly educational expenses. Although NACTC receives the majority of its funding from the state, a judgment in Hadley's favor need not implicate the state treasury. The college may levy additional millage or apply tuition monies designated "educational" to satisfy the award.

In addition, the majority opinion is not faithful to the unanimous Court's rationale in Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). In Mt. Healthy, the Supreme Court passed on the Eleventh Amendment defense proffered by a local school board in the State of Ohio. In holding that the board was akin to a political subdivision to which the Eleventh Amendment does not extend, the Court stated:

[The board] is subject to some guidance from

> the State Board of Education, and receives a significant amount of money from the State. But local school boards have extensive powers to issue bonds, and to levy taxes within certain restrictions of state law. On balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.

429 U.S. at 280-81 (Rehnquist, J.) (citations omitted).

A searching inquiry of the record reveals that NACTC enjoys independence, financially and otherwise, such that, notwithstanding its state's funding, it should be treated as an entity much like any other political subdivision or local school board. Moreover, upon analysis of the overall record, any judgment against NACTC will not be paid from the state treasury.

In summary, the majority's holding allows NACTC to enjoy the benefits of local tuition monies and local property assessments without sharing in the costs and responsibilities that attend the power to generate such funds. NACTC must take the bitter with the sweet. As we observed in Sherman:

> [A governmental entity] cannot create its own eleventh amendment immunity by structuring its resources so as to pay all breach of contract damages out of state funds. Thus, the question on remand is not whether the [entity] chooses to pay contract damages out of state funds, but whether a judgment against the [entity] can be paid from non-state funds under [its] discretionary control.

16 F.3d at 864-65 (emphasis added).

The majority seeks to avoid our holding in Sherman by indicating that it is dicta. This is puzzling to me since the portion quoted in the text is the precise holding of the case. If the test of Sherman is to be applied, then the majority is clearly in error. There is no evidence in the present case that any judgement [sic] here must necessarily be paid from state funds. The state may be obligated to fund the college, but that is not the criterion that determines whether a federal court judgment obligates the state treasury.

I respectfully dissent.

A true copy.
Attest: (signed) Michael E. Gans
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-3703

LES HADLEY,

Plaintiff - Appellee

v.

NORTH ARKANSAS COMMUNITY TECHNICAL COLLEGE,

Defendant - Appellant.

Submitted: April 14, 1995

Filed: June 5, 1995

Before LOKEN, Circuit Judge, LAY, Senior Circuit Judge, and NANGLE*, Senior District Judge.

*The HONORABLE JOHN F. NANGLE, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

PER CURIAM.

North Arkansas Community Technical College (NACTC) appeals from the district court's order denying its claim of Eleventh Amendment immunity in a 42 U.S.C. §1983 suit brought against it. Les Hadley alleges NACTC violated his due process rights in connection with his termination. He also

filed a pendent state claim for breach of contract. NACTC moved for summary judgment claiming it is an arm of the State of Arkansas and therefore immune from suit in federal court under the Eleventh Amendment. The district court denied the motion, relying solely on the holding in Parsons v. Burns, 846 F. Supp. 1372 (W.D.Ark. 1993), whichdeclared [sic] another Arkansas community college not immune. NACTC now appeals.

In deciding whether Eleventh Amendment immunity applies to a subdivision of the state, "(c)ourts typically look at the degree of local autonomy and control and most importantly whether the funds to pay any award will be derived from the state treasury." Greenwood v. Ross, 778 F.2d 448, 453 (8th Cir. 1985) (quoting Laje v. R.E. Thomason Gen. Hosp., 665 F.2d 724, 727 (5th Cir. 1982)); see Sherman v. Curators of Univ. of Mo., 16 F.3d 860, 863 (8th Cir. 1994). The key inquiry is whether a judgment against the institution must be paid from state funds, or whether it can be paid from nonstate sources under its discretionary control. Sherman, 16 F.3d at 865. Furthermore, each state instrumentality claiming immunity "must be considered on the basis of its own particular circumstances." Greenwood, 778 F.2d at 453 (quoting Soni v. Board of Trustees, 513 F.2d 347, 352 (6th Cir. 1975), cert. denied, 426 U.S. 919 (1976)); see Sherman, 16 F.3d at 863.

The district court's opinion does not set forth the particulars of NACTC's circumstances. Although the Parsons decision declared that another Arkansas community college is

not entitled to Eleventh Amendment immunity, we find the factual allegations presented in this case somewhat distinguishable. The specific characteristics of NACTC appear to be different from those set out in Parsons. For example, the budget of the college in Parsons was provided by 20.2% state funds and 33.3% local taxes -- a fact on which the Parsons court heavily relied. See 846 F.Supp. at 1379, 1380. In this case, however, NACTC's president alleges NACTC derives 58.2% of its budget from state funding and only 3.0% from local taxes.[1] In addition, NACTC's president claims all monies raised from local taxes can only be used for new acquisitions or pledged for the issuance of bonds to support new acquisitions. He further asserts that any judgment rendered against NACTC must come out of its "Unrestricted Educational and General Funds," of which state funding provides 75.1% of the total. Such factual allegations were not considered in the Parsons opinion.

Hadley challenges a number of NACTC's assertions, and the alleged differences between NACTC and the college consideration Parsons may not necessarily lead to disparate results under the Eleventh Amendment.[2] Nevertheless, because

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[1]The Affidavit of Dr. Bill Baker, President of NACTC, was the only piece of evidence submitted by either party on the motion for summary judgment. Hadley relies solely on an number of Arkansas statutes, of which he requests this court take judicial notice.

[2]For example, we agree with Hadley the mere fact that a higher percentage of NACTC's budget is derived from state funding is not dispositive. The higher percentage does not alone explain why payment of damages to Hadley would necessarily implicate these state funds. Yet this fact combined with the other facts alleged in the president's affidavit may

there appear to be disputed issues of material fact in this case, [3] and because NACTC's circumstances allegedly differ from those in Parsons, the court below erred in failing to undertake a particularized analysis of NACTC's Eleventh Amendment status.[4] See, e.g., Sherman, 16 F.3d at 863-64 (remanding because nothing in the lower court's order "considered Sherman's factual allegations about the University's autonomy, funding sources, or nonstate revenues")' Greenwood, 778 F.2d at 454 (remanding for further consideration because the district court's one-sentence decision did not provide a proper analysis of the university's status).

Thus we conclude it would be premature to rule on the Eleventh Amendment issue given the record before us. To save the parties and the court time and expense, we retain jurisdiction over this appeal and certify the question back to the district court to prepare a complete factual record either by stipulation or through an evidentiary hearing. We request that the court make detailed findings not inconsistent with our Sherman and Greenwood decisions. The district court shall undertake and complete this inquiry within a reasonable time

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support a conclusion contrary to the one in Parsons.

[3]One such disputed issue is whether NACTC can use local sources of funding for general use or only for new acquisitions. Citing ballots attached to its submitted affidavit, NACTC claims these funds are limited to new acquisitions while Hadley challenges this narrow interpretation of the ballots' language.

[4]In determining that the court erred, we need not reach the issue of whether Parsons was correctly decided.

not to exceed six months.[5]

IT IS SO ORDERED.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[5]Both parties should submit or resubmit affidavits and other evidence in support of their arguments. Although the Arkansas statutes relevant to this case are the same as those considered in Parsons, the court must evaluate these statues along with the submitted evidence to determine whether or not, on balance, NACTC's degree of local autonomy and its sources of funding for the potential judgment indicate it is an arm of the state.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3703

Les Hadley, Appellee,	*	
vs.	*	Appeal from the United States
North Arkansas Community Technical College,	*	District Court for the Western District of Arkansas
Appellant.	*	

The suggestion for rehearing en banc is denied. Judge McMillian and Judge Murphy would grant the suggestion.

The petition for rehearing by the panel is also denied. Judge Lay would grant the petition.

MCMILLIAN, Circuit Judge, with whom MURPHY, Circuit Judge, joins, dissenting from the denial of the petition for rehearing with suggestion for rehearing en banc.

The majority opinion of the panel acknowledges that the core concern in Eleventh Amendment immunity cases is whether a judgment must be satisfied from the state treasury. 76 F.3d 1437, 1439 (citing Hess v. Port Auth. Trans-Hudson Corp., 115 S.Ct. 394 (1994)). Yet the opinion completely ignores that the North Arkansas Community Technical College (NACTC) is given legislative authorization to issue revenue bonds to raise "general operation" monies, Ark. Code Ann. § 6-61-602(a) (1987), and that the Arkansas legislature explicitly

disavows any state liability to pay such bonds, § 6-61-1009 (Supp. 1993) ("The bonds shall be revenue bonds secured solely by the revenues pledged thereto, and in no event shall they be considered a debt for which the faith and credit of the State of Arkansas or any of its revenues are pledged." Ark. Code Ann. § 6-61-1009 (Supp. 1993).

The majority holding that NACTC enjoys Eleventh Amendment immunity thus defies Supreme Court precedent,[1] the law of this circuit,[2] and the law of Arkansas. The decision promises to expand uncertainty for litigants and district courts as to future Eleventh Amendment cases in this circuit. I fail to understand how this court can refuse to hear this case en banc. Hopefully, the Supreme Court of the United States will give us further direction.

April 19, 1996

A true copy.

Attest: Michael E. Gans (signed)

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[1]See Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977).

[2]See Sherman v. Curators of Univ. of Mo., 16 F.3d 860, 863-64 (8th Cir. 1994).

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

LES HADLEY PLAINTIFF

v. Civil No. 94-3035

NORTH ARKANSAS COMMUNITY
TECHNICAL COLLEGE DEFENDANT

MEMORANDUM OPINION AND ORDER

This case is a civil rights action brought by Les Hadley a former employee of North Arkansas Community Technical College (NACTC). For a period exceeding five years plaintiff was employed by the defendant as a vocational instructor of the adult education program. The complaint alleges that the plaintiff was summarily terminated without a hearing. Plaintiff contends the termination of his employment was in violation of his constitutionally protected liberty and property interests.

On October 27, 1994, this court, in ruling on the defendant's motion for summary judgment held, *inter alia*, that the defendant was not immune from suit under the Eleventh Amendment. This holding was in large part based on this court's ruling in *Parsons v. Burns*, 846 F.Supp. 1372 (W.D. Ark. 1993) which involved another community college in Arkansas. Defendant appealed the decision and by per curiam opinion of June 5, 1995, the Court of Appeals for the Eighth Circuit remanded the case for detailed findings on the Eleventh Amendment issue. *Hadley v. North Arkansas Community*

Technical College, No. 94-3703 (8th Cir. June 5, 1995). Upon receipt of the order of remand, we requested and have now received briefs and supporting documentation from the parties addressed to the limited issue of the defendant's status under the Eleventh Amendment.

Discussion.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens of Subjects of any Foreign State.

Even though the amendment by its terms does not appear to bar suits against a state by her own citizens, the Supreme Court has consistently held that an unconsenting state is also immune from suits brought in federal court by her own citizens as well as by citizens of another state. *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, ____ U.S. ____, 113 S. Ct. 684, 688-89, 121 L.Ed.2d 605 (1993) (Eleventh Amendment withdrawal of jurisdiction effectively confers immunity from suit); *Edelman v. Jordan*, 415 U.S. 561, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 64 S. Ct. 873, 88 L.Ed.2d 1121 (1944).

Moreover, the Eleventh Amendment cloak of immunity covers more than just the state itself. An agency, commission, or board, for example, may also be immune from suit if the entity bears such a close relationship to the state that a suit against the entity is in reality a suit against the state. *Edelman,*

supra; *Greenwood v. Ross*, 778 F.2d 448 (8th Cir. 1985). "It is not necessary that the state be named as a party, only that the named party is, in actuality, the *alter ego* of the state." *Blake v. Kline, 612 F.2d 718, 721 (3d Cir. 1979)*, *cert. denied*, 447 U.S. 921, 100 S. Ct. 3011, 65 L.Ed2d 1112 (1980). This doctrine, sometimes referred to as the arm-of-the-state doctrine, bestows sovereign immunity on state governmental agencies that operate as alter egos or instrumentalities of the state. The extent of Eleventh Amendment immunity is a question of federal law. *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L.Ed.2d 332 (1990).[1]

The determination of whether a particular educational entity is an arm-of-the state must necessarily be made on a case by case basis upon review of the individual state laws involved. *Sherman v. Curators of University of Missouri*, 16 F.3d 860, 863 (8th Cir. 1994) (The vast majority of federal courts faced with the question of whether a state university is immune have found that they are.); *Ambus v. Granite Bd. of Education*, 885 F.2d 992, 994 (10th Cir. 1993) (Utah school districts not arms of the state); *Mitchell v. Los Angeles Community College District*, 861 F.2d 198 (9th Cir.), *cert. denied*, 490 U.S. 1081, 109 S. Ct. 2102, 104 L.Ed.2d 663 (1989) (community college was a state entity); *Hander v. San Jacinto Junior College*, 519 F.2d 273 (5th Cir. 1975) (community college not immune from suit); *Perez v. City*

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[1]The state may, of course, waive its Eleventh Amendment immunity by giving its consent to being sued. *Parden v. Terminal Ry. of Ala. State Docks Dept.*, 377 U.S. 184, 84 S. Ct. 12097, 12 L.Ed.2d 233 (1964).

of Key West, 878 F. Supp. 216 (M.D. Fla. 1995) (community college entitled to Eleventh Amendment immunity); *Van Pilsum v. Iowa State Univ. of Science*, 863 F. Supp. 935 (S.D. Iowa 1994) (University entitled to Eleventh Amendment immunity from damages claim.); *Folse v. Delgado Community College*, 776 F. Supp. 1133 (E.D. La. 1991) (community college and board entitled to Eleventh Amendment immunity). "In making this determination courts consider as a critical factor whether any judgment rendered against the entity would ultimately come out of state funds." *Sherman*, 16 F.3d at 863.

In *Sherman* the Eighth Circuit also cited with approval the following factors delineated in *Kovats v. Rutgers, the State Univ.*, 822 F.2d 1303 (3d Cir. 19987): (1) local law and decisions defining the status and nature of the agency involved in its relation to the sovereign; (2) most importantly, whether the payment of the judgment will have to be made out of the state treasury; (3) whether the agency has the funds or the power to satisfy the judgment; (4) whether the agency is performing a governmental or proprietary function; (5) whether it has been separately incorporated; (6) the degree of autonomy over its operations; (7) whether it has the power to sue and be sued and to enter into contracts; (8) whether its property is immune from state taxation; and (9) whether the sovereign has immunized itself from responsibility for the agency's operations. *Kovats*, 822 F.2d at 1307.

Other interrelated factors include the degree of state control and supervision over the entity, the source of funds for

the entity including the ability of the entity to issue bonds and levy taxes on its own behalf, whether the entity is concerned primarily with local, as opposed to statewide, problems and whether the entity has the right to hold and use property. *See e.g., Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977); *Folse v. Delgado Community College*, 776 F. Supp. 1133, 1137 (E.D. La. 1991).

The Eighth Circuit, in remanding *Greenwood v. Ross*, *supra*, placed emphasis on two factors in determining whether an entity is the *alter ego* of the state for Eleventh Amendment purposes. The panel directed the district court to:

> [e]xamine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit in reality is a suit against the state. Courts typically look at the degree of local autonomy and control and most importantly whether the funds to pay any award will be derived from the state treasury.

Greenwood, 778 F.2d at 453, *quoting*, *Laje v. R.E. Thomason General Hospital*, 665 F.2d 724, 727 (5th Cir. 1982).

In the opinion remanding this case the Eighth Circuit, citing *Sherman*, emphasized that "[t]he key inquiry is whether a judgment against the institution must be paid from state funds, or whether it can be paid from nonstate sources under its discretionary control." *Hadley*, slip op. at 2. The Eighth Circuit also noted that we were to evaluate the relevant statutes and the evidence submitted "to determine whether or not, on balance, NACTC's degree of local autonomy and its sources of

funding for the potential judgment indicate it is an arm of the state." *Hadley*, slip op. at 4 n. 5.

With regard to the impact on the state treasury, it has been noted:

> That some public funds might be implicated is not dispositive for Eleventh Amendment purposes. Even though judgments against municipalities must invariably be paid from public funds, such suits are not barred by the Eleventh Amendment. Further, an entity's receipt of some state funding does not mean that damage awards must be considered to have been paid from the state treasury. The proper analysis focuses on whether the damage award would be paid *directly* by the state treasury, rather than indirectly through commingled state and local funds or state indemnification provisions.

Ambus v. Granite Bd. of Educ., 995 F.2d 992, 996 (10th Cir. 1993). The factors that weigh heavily on the question of financial autonomy of an educational institution are the extent of state funding, the state's oversight and control of the college's fiscal affairs, the college's ability independently to raise funds, whether the state taxes the college, and whether a judgment against the college would result in the state increasing its appropriations to the college. *Kashani v. Purdue University*, 813 F.2d 843, 845 (7th Cir.), *cert. denied*, 484 U.S. 846, 108 S. Ct. 141, 98 L.Ed.2d 97 (1987). In *Sherman* the Eighth Circuit noted the educational institution "should explain why payment of contractual damages would *necessarily* implicate the state fisc." *Sherman*, 16 F.3d at 864. The court also commented that the

institution

> cannot create its own eleventh amendment immunity by structuring its resources so as to pay all breach of contract damages out of state funds. Thus, the question on remand is not whether the University chooses to pay contract damages out of state funds, but whether a judgment against the University can be paid from non-state funds under the University's discretionary control.

Id., 16 F.3d at 864-65.

Amendment 52 of the Arkansas Constitution invested the general assembly with the authority to establish districts to furnish community college instruction and technical training. Ark. Const. amend. 52 (1964). Section 1 provides that "[t]he General Assembly shall prescribe the method of financing such community college and technical institutes, and may authorize the levy of a tax upon the taxable property in such districts for the acquisition, construction, reconstruction, repair, expansion, operation, and maintenance of facilities therefor." Ark. Const. amend. 52 § 1 (1964). Section 2 sates that no such district shall be created and no tax levied without the approval of a majority of the qualified voters in the proposed district. Ark. Const. amend. 52 §2 (1964).

The term community college is defined as

> as educational institution established or to be established by one (1) or more counties or cities of the state offering a comprehensive program designed to serve the postsecondary educational needs of its district and the state including specifically, but without limitation, occupational

> programs of varying types and levels of difficulty, the first two (2) years of a baccalaureate degree, community service offerings, and student guidance and counseling services.

Ark. Code Ann. § 6-61-501(1) (Supp. 1993).

Funds for the "general operation of an adequate comprehensive educational program" are provided by the state. Ark. Code Ann. § 6-61-601(a) (1987). The district may, if it wishes to spend larger sums of money than the state funds provide, levy millage to provide additional operation funds. *Id.* "The millage can be approved at the election to create the community college district or the question of approving the millage can be submitted to the voters of the district from time to time thereafter at special or general elections." Ark. Code Ann. 6-61-602(b) (1987). The tax authorized by Amendment 52 is by statute limited to ten (10) mills on the taxable real and personal property in the district. Ark. Code Ann. § 6-61-503(a) (1987). The tax is a continuing levy and is collected in the manner provided by law for the collection of county general taxes and is remitted to the district. Ark. Code Ann. 6-61-517(b) (1987).

NACTC's total budget for the 1993-94 fiscal year[2] was $10,635,172.00, of which state funding provided $6,191,303.00 or 58.2%, and local taxes provide $317,366.00 or 3%. The "operating budget" of NACTC was $6,342,250.00, of which state

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[2]All figures are for the 1993-94 fiscal year.

funding provides $4,762,644.00 or 75.1%, and local taxes provided no funding.[3] *Affidavit of Dr. Bill Baker, President of NACTC (hereinafter Baker aff.)* at ¶ 5. Tuition provides 22.1% of the operating budget. *Baker aff.* at ¶ 5.

State appropriations for NACTC stay in the state treasury until disbursed pursuant to state payroll and purchasing rules. *Baker aff.* at ¶ 16.[4] State accounting and budgetary procedures govern the expenditures of cash funds. Ark. Code Ann. & 19-4-801, *et. seq.*, (Repl. 1994). The term "state agency" is defined to include state-supported institutions of higher learning. Ark. Code Ann. & 19-4-801(1)(A) (Repl. 1994). The term "'cash funds' means all moneys, negotiable instruments, certificates of indebtedness, stocks and bonds held by or owned by any state agency which are not on deposit with or in the trust of the State Treasurer." Ark. Code Ann. & 19-4-801(2) (Repl. 1994). Bequests, gifts, and donations are exempted from these procedures. Ark. Code Ann. & 19-4-803 (Repl. 1994). With

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[3]We note the percentage of the NACTC's budget derived from state funds is significantly higher than that of the community college at issue in *Parsons*. In *Parsons* only 20.2% of the college's budget came from state funds. We also note that in *Parsons* there was no evidence that the use of moneys raised from local taxes was restricted in any manner.

[4]Baker also refers the court to Act 255, 1995 Ark. Acts 255, which appropriates funds for the 1995-97 biennium for NACTC. Section 7 provides that disbursements of the appropriated funds shall be in compliance with the "restrictions of State Purchasing law, the General Accounting and Budgetary Procedures Law, the Revenue Stabilization Law, the Regular Salary Procedures and Restrictions Act, the Higher Education Expenditure Restrictions Act, or their successors, and other fiscal control laws of this State, whether applicable, and regulations promulgated by the Department of Finance and Administration, as authorized by law, shall be strictly complied with in disbursement of said funds."

respect to moneys received from any millage levied by a community college district, the statute provides as follows:

> (b)(1) Any moneys received from any millage levied by a community college district . . . shall not be subject to & 19-4-802 or any of the provisions of this subchapter which require funds to be appropriated by the General Assembly.
>
> (2) The board of any community college may use the funds received from the millage levied for the purposes stated on the ballot at the time of the election authorizing the millage, i.e., construction, purchasing equipment, or where so provided on the ballot, for operation of the college, and the funds shall be subject to all such other provisions of this subchapter as are not inconsistent with this subsection.

Ark. Code Ann. & 19-4-803(b)(1-2) (Repl. 1994).

According to Dr. Baker, NACTC is authorized to raise local moneys though [sic] taxes; however, moneys raised by the local taxes cannot be used for general maintenance and operating needs. *Baker aff.* at ¶ 11. Baker asserts that the tax money may only be used for new acquisitions or pledged for the issuance of bonds to support new acquisitions. *Id.* The current millage rate for the college's local tax is 1.7 mills for real property and 3.4 mills for personal property. *Baker aff.* at ¶ 10.

It is the defendant's contention that the use of the locally raised tax moneys is limited by the language of the ballot which authorized the creation of the community college district and the levy of a tax. In support defendant cites *Hooker v. Parkin*, 235 Ark. 218, 357 S.W.2d 534 (1962) for the proposition

that a tax levied for one purpose cannot be used for another and Article 16, 11 of the Arkansas Constitution which provides as follows:

> No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same; and no moneys arising from a tax levied for one purpose shall be used for any other purpose.

Defendant has attached a copy of the November 6, 1973, ballot which established the community college district and authorized the levy of a tax not to exceed 5 mills on the dollar of the assessed value of taxable property of the district. Further, the ballot authorized the "pledging of 5 mills of the aforementioned tax for the issuance of bonds to provide all or part of the funds for the purchase of land and for the construction and furnishing of buildings and facilities for such college . . . ."

The court has also been provided a copy of the June 21, 1997, ballot which extended the bonding authority of the community college district and reauthorized the tax. The ballot indicates the tax shall be "a continuing annual levy as provided by law for the support of North Arkansas Community College." The authority granted included the pledging of the tax for the issuance of bonds "to be issued for the purpose of liquidating the District's presently outstanding bonded indebtedness (incurred to finance construction and furnishing of buildings and facilities for the College) and the purpose of providing all or part of the funds for the construction and furnishing of additional buildings and facilities for the College."

Plaintiff argues it is not clear from the wording of the ballot that the taxes raised are limited as the defendant argues. It is pointed out that the ballot states the tax moneys can be used for the support of the college. Plaintiff also points to the language of Ark. Code Ann. § 6-61-602(a) which provides the community college may levy taxes for "whatever reasons consistent with state law."

While the court believes the use of the funds is limited under Arkansas law to the purposes set forth in the ballot, it is clear the college has the authority to levy further taxes. Thus, even if the current tax moneys cannot be used for any purpose other than acquisitions, the college has the authority to levy additional millage up to the statutorily imposed maximum. Such an additional levy could be ear-marked for other purposes, including provision of operating budget funds, so long as the purpose was lawful. Any additional levy would increase the percentage of the total budget generated by local tax money.

Defendant contends that even if the local tax monies could be used to pay a judgment, the funds amount to an insignificant percentage of the college's overall budget. This significant disparity in the amount of the college's state funding versus the amount of local funding is in the defendant's view another indication that the college is an arm of the sate.

With respect to discretionary funds under its control, defendant contends there are only $650 in unrestricted donations. *Baker aff.* at ¶ 9. The only funds held by the college other than those received from the state and from local taxes,

are moneys derived from federal grants, tuition, private donations, and other miscellaneous revenue. *Baker aff.*

With respect to tuition, defendant points out that § 6-61-523 provides that student fees or tuition shall be "used for educational purposes only." Ark. Code Ann. § 6-61-523(a) (Supp. 1993). Baker advises the court that the federal grants are specific purpose grants and must be used for specific causes or efforts. *Baker aff.* ¶ 7. The federal grants typically include an indirect cost allowance which is ordinarily 7% of the total sum administered in the particular federal grant program. *Baker aff.* at ¶ 7. This indirect cost allowance serves the purpose of defraying the overhead costs associated with administering the grant. *Baker aff.* at ¶ 7.

The college also receives interest on its cash holdings and has some revenue from various sources such as private donations, add/drop fees, fees for xerox copies, library fines, and the like. *Baker aff.* at ¶ 8-12. The private donations are generally in the form of scholarships and cannot be used for any purpose other than that specified by the donor. *Baker aff.* at ¶ 8. The vast majority (approximately 99%) of donations to the college come from the NACTC Foundation, which is a non-profit corporation with its own board of directors. *Baker aff.* at ¶ 14. The donations are generally for scholarship or building projects. *Id.*

While defendant admits it has non-state funds, it contends it does not have sufficient discretionary control of these moneys to use them to pay a judgment. Therefore, it

contends any monetary relief to the plaintiff would be paid from the state treasury which is forbidden by the Eleventh Amendment.

With respect to discretionary funds, plaintiff points out that the federal moneys, tuition, and other miscellaneous revenue are designated unrestricted. If these funds are earmarked as the defendant contends, plaintiff questions the use of the term unrestricted and argues the defendant has utterly failed to show why these unrestricted funds could not be used to pay any judgment. Plaintiff also wonders what would keep the defendant from asking the NACTC Foundation to solicit contributions to cover other expenses such as any judgment rendered in this case.

On the question of local autonomy, defendant argues it does not have local autonomy and control. There are two bodies involved in the supervision and control of NACTC. The authority, duties, and functions of these bodies are set forth in the Arkansas statutes.

The State Board of Higher Education serves as the State Community College Board, Ark. Code Ann. §§ 6-61-501(5) (Supp. 1993), 6-61-504 (1987), and acts as the statewide coordinating board for the community colleges. Ark. Code Ann. § 6-61-505(a) (1987). The duties of the State Community College Board are set out by statute. Ark. Code Ann. § 6-61-505(c) (1987). The State Board has the statutory authority to withdraw or withhold state funding "(1) If an institution fails or refuses to maintain prescribed standards of administration or

instruction; (2) If a local board fails to appoint as president of the technical or community college one (1) of the candidates found to be qualified by the state board;[5] or (3) If an institution fails to achieve accreditation within the time limits prescribed by this chapter." Ark. Code Ann. § 6-53-105 (Supp. 1993). The State Board of Higher Education itself consists of thirteen members appointed by the governor and confirmed by the Senate. Ark. Code Ann. § 6-61-201(a)(1) (Supp. 1993).

Local control of each community college is vested in a local board composed of nine members who are residents and qualified electors of the community college district. Ark. Code Ann. § 6-61-520(a) (Supp. 1993). The members of the board are elected on a nonpartisan basis for six-year terms by the qualified electors of the community college district. Ark. Code Ann. § 6-61-520(b)-(c) (Supp. 1993). Vacancies on the board due to death, resignation, or other causes are filled by appointment of the governor. Ark. Code Ann. § 6-61-520(d)(1) (Supp. 1993).

The local board is empowered, *inter alia*: (1) to select its officers; (2) to develop, with the advice of the State Community College Board, the educational program; (3) to appoint, with the advice of the State Community College Board, a president and fix the compensation and terms of office of the president who shall be the executive officer of the local board and the

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[5]This provision significantly impacts the authority granted the local board in Ark. Code Ann. § 6-61-521 (1987). We note that no party in *Parsons* cited the court to this statute.

college; (4) to appoint, upon nomination of the president, members of the administrative and teaching staffs and to fix their compensation and terms of employment; (5) to enter into contracts; (6) to accept grants or contributions of money to be used for any of its purposes; (7) to acquire, own, lease, use, and operate property; and (8) to exercise the right of eminent domain. Ark. Code Ann. § 6-61-521 (1987).

Defendant argues the college is almost totally dependent on state appropriations for its funding and must operate within the guidelines and under the supervision of the State Board. Defendant informs the court that the State Board participates in the actual day-to-day operation of the college. *Baker aff.* Defendant has provided the following examples of participation by the State Board: establishment of the system enumerating the minimum qualifications for the president of the institution, Ark. Code Ann. § 6-53-203(3); review, evaluation, and coordination of budget requests for the community colleges, Ark. Code Ann. § 6-53-203(4) & 6-61-601; development of a single set of budget forms utilized by all parties in making requests and recommendations for the funding of the institution, Ark. Code Ann. §§ 6-53-203(7), 6-53-208, 6-61-215[6];

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[6]Two of the cited statutes merely indicate the State Board determines a minimum level of student tuition and fees to be charged. *See* Ark. Code Ann. § 6-53-203(7) (Supp. 1993) (minimum level determined); Ark. Code Ann. § 6-53-208 (Supp. 1993) (minimum level determined and tuition and fees should be maintained at a reasonable level). The third statute, Ark. Code Ann. § 6-61-215 (1987) indicates the board shall "have the power and duty to establish the level of student fees for funding purposes for both in-state and out-of-state students. . . ." The local board is vested with authority to determine the amount of the fee to be charged above the

recommendation of the establishment, expansion or abolition of institutions, Ark. Code Ann. § 6-53-203(9); recommendation and review of curricula, Ark. Code Ann. § 6-53-203(10)(d) & § 6-61-214; capital outlays must be accomplished with input from the General Assembly, State Board, and Chief Fiscal Officer of the State of Arkansas[7] Ark. Code Ann. § 6-53-207; and performance appraisal systems for faculty are approved by the State Board prior to implementation, Ark. Code Ann. § 6-61-219. Baker also provides as additional examples the state board's approval of the consolidation of North Arkansas Community College and Twin Lakes Technical College, the approval of the college's name change and approval of a program/course. *Baker aff.* at ¶ 21. Baker asserts "[t]hat salary levels, maximum salaries, positions that can be filled, programs that can be offered, purchasing procedures, and accounting procedures are all regulated by agencies of the State Government." *Baker aff.* at ¶ 22. We are also informed that NACTC's campus is state owned. *Baker aff.* at ¶ 25.

Defendant informs the court that the term "state agency"

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minimum level. Ark. Code Ann. § 6-61-523 (Supp. 1993).

[7]The prior approval of the General Assembly is required for "any expenditure of **State Treasury** funds for capital outlay expenses or construction costs. . . ." Ark. Code Ann. § 6-53-207(a) (Supp. 1993) (emphasis added). Additionally, "prior to the withdrawal of **state funds** from the State Treasury for approved capital outlays the board must transmit to the Chief Fiscal Officer of the State a certificate from the chairman of the local board stating "that a minimum of fifty percent (50%) of each project cost has been provided by local funds." Ark. Code Ann. § 6-53-207(b) (Supp. 1993) (emphasis added).

is defined in various statutory provisions to include all state supported institutions of higher learning. Ark. Code Ann. § 19-4-801(1)(A) (budgetary procedures; Ark. Code Ann. § 22-2-102 (state building services); Ark. Code Ann. §25-4-101 (computer services); Ark. Code Ann. § 22-8-202 (motor vehicles). Dr. Baker indicates NACTC is regulated by the following agencies of state government: the State Board of Higher Education; Department of Higher Education; Office of Personnel Management; Department of Finance and Administration; Office of the Attorney General; Governor's Office; Office of Computer Services; State Auditor's Office; State Building Services; and the Insurance Department and Claims Commission.

The defendant also informs the court that both the Arkansas Department of Finance and Administration and the Arkansas Attorney General have determined that the Arkansas community colleges are state agencies. Defendant concedes neither determination dealt with the issue of Eleventh Amendment immunity which is a determination of federal not state law. The determination made by the Department of Finance and Administration dealt with whether the community college was exempt as a state agency from paying Arkansas real estate transfer tax. The determination made by the Arkansas Attorney General was in connection with whether a community college qualified as an agency of the state for purposes of grants payable from the Natural and Cultural Resources Grants and Trust Fund. *Baker aff.* at ¶ 24 & 26.

While plaintiff does not dispute the instances of state supervision and control enumerated by the defendant, plaintiff argues the local electorate and the elected local board members are given substantial autonomy over the local community college. Additionally, the power to levy taxes is not in plaintiff's view merely an incidental power but indicates the college is not exclusively dependent on the state.

After considering the structure of NACTC and the relevant Arkansas statutes, it is clear that NACTC, as a part of the system of higher education, is characterized by state law as an agency of the state and is under the supervision of the State Board. While many of the functions and decisions of the college are within the control of the local elected board, the local board must operate within the guidelines and under the supervision of the State Board of Education which is comprised of members appointed by the Governor. Additionally, the college must be operated within numerous other state guidelines.

In comparison to the University of Arkansas and the University of Central Arkansas the community college is significantly more autonomous. For instance, NACTC has the power to tax, is governed by a local elected board with the supervision of a state board rather than being directly governed by a board appointed by the governor,[8] and has the power to

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[8]However, as pointed out above, when Ark. Code Ann. § 6-61-521 is read in conjunction with Ark. Code Ann. § 6-53-105, the power of self-government vested in the local board is not nearly as broad as would

acquire, own, lease, use and operate property while all property acquired by the state Universities is itself titled in the name of the state. *See* Ark. Code Ann. § 6-67-103 (1987).[9] However, the exercise of these powers is subject to state regulation and as we noted earlier NACTC's campus is state owned.

The state law characterization and the degree of local autonomy are not, however, considered the most significant factors. As noted above, the key inquiry in assessing an entity's status under the Eleventh Amendment is whether any judgment against it would necessarily be paid with state funds.

NACTC does have the ability to raise non-state funds by means of levying taxes, seeking and accepting donations and grants, and by charging for various services it renders. However, the majority of the funds are specific purpose funds and are not considered discretionary funds.

As the court in *Van Pilsum v. Iowa State Univ. of Science*, 863 F. Supp. 835 (S.D. Iowa 1994) pointed out, most post-secondary institutions have various means of generating income from such things as athletic events, bookstores, bequests, gifts, donations, etc. The *Van Pilsum* court in addressing the issue of a state university's immunity under the

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appear from a mere reading of Ark. Code Ann. § 6-61-521. For example, although Ark. Code Ann. § 6-61-521 says that the local board has the power to appoint the president of the college, Ark. Code Ann. § 6-53-105 seems to require the local board to hire one of the candidates found to be qualified by the State Board or risk losing funding.

[9]The University of Arkansas and the University of Central Arkansas are listed as "state colleges" in various statutes. *See e.g.*, Ark. Code Ann. § 6-62-201 (1987).

Eleventh Amendment noted that "[a]ll state-supported universities generate income from similar sources and yet, in the vast majority of reported decisions, they have been found to share in their respective state's Eleventh Amendment immunity." *Id.* at 937. The "crucial question . . . is whether use of these unappropriated funds to pay a damage award . . . would interfere with the fiscal autonomy and political sovereignty of [the state]." *Lewis v. Midwestern State Univ.*, 837 F.2d 197, 199 (5th Cir.), *cert. denied*, U.S. 849, 109 S. Ct. 129, 102 L.Ed.2d 102 (1988).

The *Van Pilsum* court found the following language from *Kashani v. Purdue Univ.*, 813 F.2d 843 (7th Cir.), *cert. denied*, 484 U.S. 846, 108 S. Ct. 141, 98 L.Ed.2d 97 (1987) to be instructive:

> If a judgment were awarded against Purdue, the state treasury would not write out a check to Kashani. But in view of the fact that Purdue is by design dependent on state appropriations, which are evidently carefully geared through close oversight to meet the changing financial needs of the university, it is apparent that the payment would directly affect the state treasury. Indiana has not created an entity with a separate financial basis; it has created one that is dependent upon and functionally integrated with the state treasury.

Van Pilsum, 863 F. Supp. at 938, *quoting, Purdue Univ.*, 813 F.2d at 846. The *Van Pilsum* court concluded that any judgment "would be paid directly out of the state treasury, or would directly affect the state treasury and the sovereignty of Iowa by

influencing state appropriation and budgeting decisions." *Van Pilsum*, 863 F. Supp. at 938-39.

After reviewing the extensive control over NACTC's finances, we conclude that any damage award in this case would be paid directly out of the state treasury or would directly affect the state treasury. Appropriated state funds comprise 75.1% of the operating budget of the college and 58.2% of the overall budget. The use of tuition and other student fees is dedicated to the education of the students. Of the remaining funds generated by NACTC, the majority is restricted to specific programs, purposes, or needs of NACTC. In sum, NACTC has very few resources that could truly be classified as discretionary and would be available to pay a judgment in this case or in any other case.

In sum when the court balances the factors set forth above in light of NACTC's situation, we conclude that NACTC is entitled to Eleventh Amendment immunity.

Dated: July 21, 1995.

(signed) H. Franklin Waters
United States District Judge

Filed July 24, 1995

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

LES HADLEY
PLAINTIFF

v. Civil NO. 94-3035

NORTH ARKANSAS COMMUNITY
TECHNICAL COLLEGE
DEFENDANT

ORDER

On this 27th day of October, 1994, came on for consideration the defendant's motion for summary judgment and the plaintiff's response thereto. The plaintiff, a former instructor for defendant, has asserted a cause of action under 42 U.S.C. § 1983 and a state law breach of contract claim. Specifically, plaintiff asserts that his constitutional due process rights were violated when he received notice he would not be given a teaching contract for the next year. Further, plaintiff contends his non-renewal did not comply with the defendant's own policies.

Defendant has moved for dismissal of this action. First, defendant contends that it is immune from suit by virtue of the Eleventh Amendment of the United Sates Constitution. Second, defendant asks us to decline to exercise supplemental jurisdiction over the state law claim in the event we hold it immune from suit on the federal law claim. Third, defendant contends it is immune from suit on the state law claim by virtue

of the sovereign immunity provision in the Arkansas Constitution.

As plaintiff correctly notes, this court has already determined that a different community college in this state was not entitled to Eleventh Amendment immunity. *See Parsons v. Burns,* 846 F. Supp. 1372 (W.D. Ark. 1993). This court's ruling in the *Parsons* case is presently on appeal to the Court of Appeals for the Eighth Circuit. The same constitutional amendment and statutes govern the operation of the defendant in this case. As the defendant is set-up and operated in a manner virtually identical to that of the community college at issue in the *Parsons* case, we will adhere to our prior decision. We do not believe a detailed discussion is necessary. Counsel are referred to our opinion in *Parsons* for a more detailed explanation of the court's rationale.

We note an argument could have been made that the defendant, even if immune from suit under the Eleventh Amendment, had waived such immunity by virtue of its entering an appearance in this case. The defendant filed an answer on June 28, 1994. A state can, of course, waive its Eleventh Amendment immunity through conduct. *Hankins v. Finnel,* 964 F.2d 853 (8th Cir. 1993), *cert. denied,* ___ U.S. ____, 113 S. Ct. 635, 121 L.Ed.2d 566 (1992). "Courts have inferred a waiver when the State has made a general appearance in federal court and defended a lawsuit on the merits." *Id.* at 856.

As defendant has not prevailed on the Eleventh Amendment issue, we have original jurisdiction over this action

and may decline to exercise supplemental jurisdiction over the state law claim only for the reasons enumerate din 28 U.S.C. § 1367(c). The remaining question is whether by virtue of state law the defendant is immune from suit on the breach of contract claim. Whether the defendant is immune under state law from suit on the contract claim is a separate issue from its Eleventh Amendment immunity. This question is governed by state law rather than federal law. To answer this question it must first be decided whether the claim constitutes a claim against the State. *Arkansas Dep't of Human Serv. v. State*, 312 Ark. 481, 486, 850 S.W.2d 847 (1993).

It is the defendant's position that the sovereign immunity provision in the Arkansas Constitution presents a jurisdictional bar to the plaintiff's breach of contract claim. Article 5, § 20 of the Arkansas Constitution provides "[t]he State of Arkansas shall never be made defendant in any of her courts." We are informed that the Arkansas Department of Finance and Administration and the Arkansas Attorney General have determined that community colleges in Arkansas are state agencies. We are also told that the defendant's campus is state owned. These assertions are supported by the affidavit of Dr. Bill Baker president of North Arkansas Community Technical College and various exhibits.

The legal counsel for the Arkansas Department of Finance and Administration has opined that the community colleges are state agencies for purposes of real property transfer taxes. The opinion letter notes that the community colleges are

authorized to exercise certain functions of state government. The letter also referred to the ruling of the State Attorney General discussed below and to an Attorney General ruling which held the community colleges immune from tort liability. It was concluded that the community college was an agency of state government for purposes of various state laws including exemption from the Arkansas real property transfer tax.

The ruling from the State Attorney General involved a question of whether Arkansas community colleges were eligible to apply for and receive grants from the Arkansas Natural and Cultural Resources Grants and Trust Fund. The grants were to be used in the acquisition, management, and stewardship of state owned lands or the preservation of state-owned historic sites, buildings, structures or objects. These grants were also available to other agencies of the state authorized by law to acquire, manage, operate, and maintain the lands. It was the opinion of the Attorney General that a community college qualifies as an agency of the state for purposes of receiving grants under this program. The opinion letter goes on to note that the Attorney General had previously opined that community colleges were agencies of the state. In particular it was noted that community colleges are considered state agencies under the Arkansas State Building Services Act, Ark. Code Ann. § 22-2-101 *et seq.* Under that Act, state agency is defined to include any "institution of higher learning including colleges, universities and vocational-technical schools . . . ." Ark Code Ann. § 22-2-102(5) (Supp. 1993). Defendant cites no

court rulings on the issue of whether the community colleges are state agencies.

While plaintiff does not separately address the issue of defendant's immunity under state law, he has referred the court to Ark. Code Ann. § 6-13-102 which provides that each school district is a body corporate and may contract and sue and be sued in its corporate name. This statute appears to apply only to school districts and not to community colleges. Plaintiff cites no authority for the proposition that this statute applies to post-secondary institutions. Plaintiff also notes that the legislature has by virtue of its express statutory power permitted cases alleging contractual liabilities against municipalities and other subdivisions to be brought. Plaintiff cites the court to Ark. Code Ann. §§ 21-9-202 & 203 which give the Arkansas State Claims Commission jurisdiction and authority to settle claims brought against the officers or employees of the State of Arkansas.

Sovereign immunity applies when the action is in reality an action against the State of Arkansas. The standard for determining whether the State is the real party in interest has been set forth by the Arkansas Supreme Court. In *Beaulieu v. gray*, 288 Ark. 395, 705 S.W.2d 880 (1986), the court stated:

> Accordingly, it is well settled, as a general proposition, that, where a suit is brought against an officer or agency with relation to some matter in which defendant represents the state in action and liability, and the state, while not a party of record, is the real party against which relief is sought so that a judgment for the

> plaintiff, although nominally against the named defendant as an individual or entity distinct from the state, will operate to control the action of the state or subject it to liability, the suit is in effect one against the state and cannot be maintained without its consent.

Id., 288 Ark. at 398, *quoting, Page v. McKinley*, 196 Ark. 331, 118 S.W.2d 235 (1938). "Any suit, whether in law or equity, which has for its purpose and effect, directly or indirectly, coercing the State, is one against the State." *Arkansas Dep't of Human Serv.*, 312 Ark. at 487.

The Arkansas courts have ruled that various institutions are the state for sovereign immunity purposes. *See e.g., Jobe v. Urquhart*, 98 Ark. 525, 136 S.W. 663 (1911) (suit against penitentiary board regarding the purchase of land for a convict farm is one against the state); *The Allen Engineering Co. v. Kays*, 106 Ark. 174, 152 S.W.992 (1913) (suit against trustees of state agricultural school is one against the state); *State Comm'r of Labor v. University of Arkansas*, 241 Ark. 399, 407 S.W.2d 916 (1966) (suit against Board of Trustees was a suit against the state). School districts, however, do not enjoy sovereign immunity although there are statutory grants of immunity. *See e.g.,* Ark. Code Ann. § 21-9-301 (Supp. 1993). *See also West Memphis School Dist. No. 4 v. Circuit Court*, 316 Ark. 290, 871 S.W.2d 368 (1994). The precise issue before us appears not to have been decided by the Arkansas courts. Even if this issue is decided in favor of the plaintiff, a second issue remains.

The second issue to be determined is whether the state

has waived its immunity by entering an appearance. This question has not been addressed by the parties. The Arkansas Supreme Court has held that a state agency waived its sovereign immunity by entering its appearance and seeking affirmative relief. *Arkansas Game & Fish Comm'n v. Lindsey*, 299 Ark. 249, 771 S.W.2d 769 (1989). "The only exception to total and complete sovereign immunity from claims which has been recognized by this court occurs when the state is the moving party seeking specific relief. In that instance the state is prohibited from raising the defense of sovereign immunity as a defense to a counterclaim of offset." *Fireman's Ins. Co. v. Arkansas State Claims Comm'n*, 301 Ark. 451, 455, 784 S.W.2d 771 (1990).

In view of the importance of any court decision on the issue of sovereign immunity under the Constitution of the State of Arkansas, we believe this is an appropriate case to decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(1) & (c)(4). The court believes this matter is better left to the Arkansas courts for decision in the first instance.

For the reasons stated, the motion for summary judgment is denied. However, the court declines to retain jurisdiction over the state law breach of contract claim. Accordingly, the state law claim is dismissed without prejudice.

IT IS SO ORDERED.

(signed) H. Franklin Waters
United States District Judge

Filed October 27, 1994

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

LES HADLEY **PLAINTIFF**

VS. **NO. 94-3035**

NORTH ARKANSAS COMMUNITY TECHNICAL COLLEGE **DEFENDANT**

AFFIDAVIT

Comes now Dr. Bill Baker, and upon his oath, states:

1. That I am of legal age and am competent to testify about the matters stated herein.

2. That I am President of North Arkansas Community/Technical College.

3. That Amendment 52 of the Arkansas Constitution states that "The General Assembly may by law provide for the establishment of districts for the purpose of providing community college instruction and technical training. The General Assembly shall prescribe the method of financing such community college and technical institutes, and may authorize the levy of a tax upon the taxable property in such districts for the acquisition, construction, reconstruction, repair, expansion, operation, and maintenance of facilities therefor."

4. That Act 5 of 1975 (Ark. Code Ann. §19-4-801, et seq.) defines "state agency" to "...include all Boards, Commissions, Departments, Agencies, Institutions, Offices or Officers, State-supported Institutions of Higher Learning, and

any other office or unit of government of the State of Arkansas created or established pursuant to law or pursuant to any action of the Governor, functioning under appropriation made by the Arkansas General Assembly or functioning as a representative of the State without legislative appropriation..." (emphasis supplied).

5. That the "extent of state funding" is best observed by a review of the College's operating budget. That the College's operating budget for the 1993-1994 fiscal year is $6,342,250.000, of which state funding provides $4,762,644300 or 75.1%, while tuition provides $1,398,589.00 or 22.1% (See Attachment #1).

6. That tuition payments are dedicated for financing the students' education. Tuition, together with the funding derived from state appropriations, finances the cost of a student's education at NACTC.

7. Federal funds consist of various types of federal grant programs. These grants are specific purpose grants and must be used for specific causes or efforts. Most federal grants also include an "indirect cost allowance." The $80,424.00 listed in the category "Federal" under "Unrestricted Educational and General Funds" ("G and E Funds"), represents "indirect cost allowances." An indirect cost allowance is typically 7% of a federal grant program. This allowance is for the purpose of defraying the overhead costs associated with administering the grant and is specifically dedicated for such purpose.

8. Private donations made directly to the College

are generally for scholarships. Donations ear-marked for a specific purpose cannot be used for any purpose other than the purpose specified by the donor.

9. For fiscal year 1993-94, there was a total of $650.00 in unrestricted private donations made to the College. (See Attachment #1)

10. That the current millage rate is 1.7 mills for real property and 3.4 mills for personal property. For fiscal year 1993-1994, the College received $317,366.00 in local taxes, 3% of the College's funding.

11. That monies raised by local taxes, however, are not used for any of the College's operating budget. The collection of local taxes does not assist the College in its "ability to independently raise funds." Monies raised by local taxes can only be used for new acquisitions made by the College and/or be pledged for the issuance of bonds to finance new acquisitions. The local taxes cannot be used for any other purpose. (See Attachments #2 and #3).

12. The category "other" of the College's "E & G Funds" consists primarily of interest on "cash on hand" and other miscellaneous revenue generated from operating costs. Interest on the College's cash holdings is generated from interest earned on tuition monies and private monies held as "ready cash" in checking accounts. Miscellaneous revenue comes from various sources such as add/drop fees, fees for xerox copies, library fines and the like. (See Attachment #1)

13. The category "Other" under "All Funds" consists

of interest on restrictive endowments, funds from the North Arkansas Community Technical College Foundation ("Foundation") and the athletic booster club. (See Attachment #1)

14. Approximately 99% of all donations to the College come from the NACTC Foundation, which is a free standing, non-profit organization with its own board of directors, separate and apart from the College's board of directors. The vast majority of donations made to the Foundation are for scholarship or building projects. Upon approval by the Foundation's board, the Foundation's funds are distributed to the College.

15. Any judgment rendered against the College could not be satisfied with funds derived from local tax monies.

16. That the "oversight and control of the College's fiscal affairs" is best illustrated by the fact that all state appropriations for NACTC stay in the state treasury and are parceled out to the College pursuant to the state payroll and purchasing rules.

17. That Act 5 of 1975 (Ark. Code Ann. §19-4-801, et seq.) specifies control over the expenditure of cash funds; defines cash funds inclusively; requires budget, approval and appropriation by the General Assembly; necessitates compliance with the budgetary procedures established by the Legislative Council; requires the involvement of the Pre-Audit section of the Department of Finance and Administration to process vouchers; requires the investment of fund vouchers; provides for

petty cash accounts; permits payrolls to be paid on a reimbursement basis; defines the responsibilities of agency heads and the Chief Fiscal Officer; provides requirements for voucher examination and approval, erroneous payments, supporting papers and copies of contracts.

18. That Act 255 of 1995, the Appropriation Act for the College, provides in Section 5 that the "Disbursement of funds authorized by this Act shall be limited to the appropriation for such agency and funds made available by law for the support of each appropriations; and the restrictions of the State Purchasing Law, the General Accounting and Budgetary Procedures Law, the Revenue Stabilization Law, the Regular Salary Procedures and Restrictions Act, the Higher Education Expenditure Restrictions Act, or their successors, and other fiscal control laws of this state, where applicable, and regulations promulgated by the Department of Finance and Administration, as authorized by law, shall be strictly complied with in disbursement of said funds" (emphasis supplied).

19. That the agencies of the State Government which regulate North Arkansas Community/Technical College or to which North Arkansas Community/Technical College must answer include the State Board of Higher Education, Department of Higher Education, Office of Personal Management, Department of Finance and Administration, Office of the Attorney General, Governor's Office, Office of Computer Services, State Auditor's Office, State Building Services, Insurance Department and Claims Commission.

20. That the State Board of Higher Education, pursuant to Ark. Code Ann. §6-53-101, et seq., participates in the actual day-to-day operation of the College, and the following are presented as examples of such participation:

A. The State Board of Higher Education may approve the withdrawal or withholding of state financial and administrative support under certain prescribed conditions. Ark. Code Ann. §6-53-105.

B. The State Board of Higher Education, via the College Panel, establishes the system enumerating the minimum qualifications for the president of an institution covered under this chapter. Ark. Code Ann. §6-53-203(3).

C. The State Board of Higher Education via the College Panel, reviews, evaluates and coordinates budget requests for the institutions covered under this chapter. Ark. Code Ann. §6-53-203(4); Ark. Code Ann. §6-61-601.

D. The State Board of Higher Education via the College Panel, in conjunction with the institution, the Governor, and the Legislative Council, develops a single set of budget forms utilized by all parties in making requests and recommendations for the funding of the institution. This is accomplished in order that the Legislative Joint Auditing Committee may determine that state funds are used in compliance with the granting of such funds. Ark. Code Ann. §6-53-203(5)(6); Ark. Code Ann. §6-61-209.

E. The State Board of Higher Education, via the College Panel, determines the level of student tuition and

fees for funding purposes. Ark. Code Ann. §6-53-203(7); §6-53-208; Ark. Code Ann. §6-61-215.

F. The State Board of Higher Education via the College Panel, recommends to the Board and the General Assembly, the establishment, expansion or abolition of institutions. Ark. Code Ann. §6-53-203(9).

G. The State Board of Higher Education via the College Panel, shall recommend and review curricula of institutions. Ark. Code Ann. §6-53-203(10)(d); Ark. Code Ann. §6-61-214.

H. Capital outlays for the institution must be accomplished with input from the General Assembly, State Board of Higher Education and Chief Fiscal Officer of the State of Arkansas. Ark. Code Ann. §6-53-207.

I. Performance appraisal systems for facility review are approved by the State Board of Higher Education prior to implementation. Ark. Code Ann. §6-61-219.

J. The State Board of Higher Education also acts as the State Community College Board in serving as the statewide coordinating board for the community colleges established within the State of Arkansas. Ark. Code Ann. §6-61-505, et seq.

21. The following are presented as additional examples of the State Board of Higher Education's participation in the actual day-to-day operation of the College:

A. Attachment #4 hereto shows approval on July 24, 1992 by the State Board of Higher Education of the

consolidation of North Arkansas Community College and Twin Lakes Technical College.

B. Attachment #5 hereto shows approval on January 29, 1993 by the State Board of Higher Education of the College's name change.

C. Attachment #6 hereto is an example of the approval by the State Board of Higher Education of a program/course at the College.

22. That salary levels, maximum salaries, positions that can be filled, programs that can be offered, purchasing procedures, and accounting procedures are all regulated by agencies of the State Government.

23. That the State Agency Code for the College is #180.

24. That the Department of Finance and Administration has determined that Arkansas community colleges are state agencies as evidenced by Revenue Legal Counsel Opinion Letter dated December 10, 1991, a copy of which is attached hereto as Attachment #7.

26. That the Office of the Arkansas Attorney General has determined that Arkansas community colleges are state agencies, as evidenced by Opinion No. 89-002, a copy of which is attached hereto as Attachment #8.

25. That the College's campus is state-owned. (See Attachment #9)

27. That this listing of the numerous state regulations that the College is required to adhere to is not

exhaustive, but is a reflection of the superintending control of the State of Arkansas has regarding community colleges.

28. Further the Affiant says not.

(s) Bill Baker
Dr. Bill Baker, President
North Arkansas Community/
Technical College

STATE OF ARKANSAS)
COUNTY OF PULASKI)

SUBSCRIBED AND SWORN TO before me, the undersigned Notary Public, on this 14th day of June, 1995.

(s) Marcia N. Diaz
NOTARY PUBLIC

My Commission Expires:

Jan. 22, 2001

[NOTARY PUBLIC SEAL OF
MARCIA N. DIAZ, PULASKI
COUNTY, ARK.]

[LETTERHEAD]
NORTH ARKANSAS
COMMUNITY/TECHNICAL
COLLEGE
Pioneer Ridge
Harrison, AR 72601
Telephone: 501/743-3000
Fax: 501/743-3577

NORTH ARKANSAS COMMUNITY/
TECHNICAL COLLEGE

FUNDING SUMMARY
FOR FISCAL YEAR 1993-94

	Unrestricted Educational and General Funds		All Funds	
	$	%	$	%
State	4,762,644	75.1	6,191,303	58.2
Federal	80,424	1.2	1,961,207	18.4
Tuition	1,398,589	22.1	1,402,824	13.2
Private	605	--	170,587	1.6
Local Millage	--	--	317,366	3.0
Other	99,943	1.6	591,885	5.6
TOTAL	6,342,250	100.0	10,635,172	100.0

Attachment 1

[PHOTOCOPY OF OFFICIAL BALLOT]

OFFICIAL BALLOT

SPECIAL ELECTION

Boone County, Arkansas

NOVEMBER 6, 1973

Vote by placing an "X" in the square either For or Against

Vote for or against the establishment of a Community College District to be composed of Boone County. This includes authorizing the levy of a tax not to exceed 5 mills on the dollar of the assessed value of taxable property of the district and authorizing the pledging of 5 mills of the aforementioned tax for the issuance of bonds to provide all or part of the funds for the purchase of land and for the construction and furnishing of buildings and facilities for such college, said bonds to be retired over a 10 year period.

__ FOR the establishment of a Community College District.

__ AGAINST the establishment of a Community College District.

****

LIST OF VOTER'S NO.
Attachment 2

[PHOTOCOPY OF ABSENTEE BALLOT]

OFFICIAL ABSENTEE BALLOT

Special Election

BOONE COUNTY COMMUNITY COLLEGE DISTRICT
JUNE 21, 1977

Vote by placing an "X" in the square For or Against

Vote FOR or AGAINST the extension of the bonding authority of Boone County Community College District (the "District") and the reauthorization of the present tax of five (5) mills on the dollar of the assessed value of the taxable property in the District as a continuing annual levy as provided by law for the support of North Arkansas Community College (the "College"). This includes authorizing the pledging of all or any portion of the aforementioned tax for the issuance of bonds, to mature over such period or periods as may be lawfully prescribed by the Board of Trustees of the College, to be outstanding bonded indebtedness (incurred to finance construction and furnishing of buildings and facilities for the College) and for the purpose of providing all or part of the funds for the construction and furnishing of additional buildings and facilities for the College.

__ FOR extension of the bonding authority and reauthorization of the five (5) mill tax.

__ AGAINST extension of the bonding authority and reauthorization of the five (5) mill tax.

List of Voters Nos._____

Attachment 3

Agenda Item No. 26
Consolidation of Twin Lakes Technical College and
North Arkansas Community College

The consolidation of Twin Lakes Technical College and North Arkansas Community College follows the same pattern established previously with the merger of White River Technical College and ASU-Beebe. With strong community support, these two institutions, both located in Harrison, have developed a high level of cooperation, working together to educate students and avoid costly duplication of services. As a symbol of their cooperation, NACC has agreed to a name change for the new consolidated institution so that the new multi-campus college will not carry the name of either institution. The new name will be brought to the Board in the fall and then taken to the Legislature in January.

RESOLVED, That the State Board of Higher Education hereby authorizes the consolidation of Twin Lakes Technical College and North Arkansas Community College, effective July 24, 1992.

FURTHER RESOLVED, That the State Board requests concurrence for this action from the Board of Trustees of North Arkansas Community College and from the Commission on Institutions of Higher Education of the North Central Association.

FURTHER RESOLVED, That once these approvals have been given, the State Board authorizes the transfer of all property, personnel, records, appropriations, fund balances, and other assets of Twin Lakes Technical College to the Board of Trustees of North Arkansas Community College.

FURTHER RESOLVED, That the State Board authorizes the Director of the Department of Higher Education to notify the President and Chair of the Board of Trustees of North Arkansas Community College the State Board gives approval to NACC to offer the instructional programs currently in place at Twin Lakes Technical College.

FURTHER RESOLVED, That the State Board authorizes the Director of the Department of Higher Education to take all necessary administrative steps consistent with this agenda item to implement the consolidation of Twin Lakes Technical College and North Arkansas Community College, including the delegation of daily operational authority for Twin Lakes Technical College to the President of North Arkansas Community College until the date of North Central Association approval for the consolidation.

Agenda Item No. 12
Name Change
North Arkansas Community College/Twin Lakes Technical College

At the time the consolidation of North Arkansas Community College and Twin Lakes Technical College was approved by the State Board in July, 1992, a new name for the institution was not proposed. After review by the local community and the NACC Board of Trustees, the name proposed for the consolidated campus is "North Arkansas Community/Technical College":

> RESOLVED, That the State Board of Higher Education approves the name "North Arkansas Community/Technical College" for the institution created by the consolidation of North Arkansas Community College and Twin Lakes Technical College.
>
> FURTHER RESOLVED, That the State Board will recommend this change to the 1993 General Assembly with the request that statutory language be enacted to rename the consolidated institution.

Agenda Item No. 22
Advanced Certificate in Electronics
North Arkansas Community/Technical College

Under the proposal, students with an associate degree in electronics will be able to complete an additional 30 credit hour advanced certificate program. Course selection in the advanced program will allow students to emphasize one of three areas: electromechanical technology, broadcast electronics technology, or consumer electronics technology.

RESOLVED, That the State Board of Higher Education approves an Advanced Certificate in electronics (CIP 15.0303) with options in electromechanical, broadcast, and consumer technology for North Arkansas Community/Technical College effective fall semester, 1994.

FURTHER RESOLVED, That the State Board of Higher Education instructs the Director of the Arkansas Department of Higher Education to inform the Chair of the Board of Trustees and President of North Arkansas Community/Technical College of this action.

FURTHER RESOLVED, That the State Board instructs the Director to conduct a follow-up review of this program after the 1995-96 academic year to determine fulfillment of the criteria for new program proposals.

[LETTERHEAD]

STATE OF ARKANSAS
Department of Finance and Administration
P.O. Box 1272
Little Rock, 72203

REVENUE LEGAL COUNSEL PHONE (501)882-7030
FAX (501)882-7599

December 10, 1991

Mr. Tom Spencer, President
East Arkansas Community College
Forrest City, Arkansas 72335-9598

RE: Real Property Transfer Tax - Community College

Dear Mr. Spencer:

I am in receipt of your letter dated December 4, 1991 to the Arkansas Department of Finance and Administration requesting a legal opinion. You wish to know whether the East Arkansas Community College, which is in the process of adding 31.69 acres of land to its campus in Forrest City must pay the Arkansas real estate transfer tax.

The following statute applies to your question:

Ark. Code Ann. §26-60-102(1), provides:

> The real property transfer tax imposed by this chapter shall not apply to transfers of the following:
>
> (1) Transfers to or from the United States, State of Arkansas, or any of the instrumentalities, agencies, or political subdivisions thereof;

In order for East Arkansas Community College to be exempt from the Arkansas real estate transfer tax, it is necessary to find that East Arkansas Community College is an agency or

instrumentality of state government for purposes of this statute. In order to reach this determination, it is necessary to determine the relationship of East Arkansas Community College to the State of Arkansas. Under the Revenue Stabilization law, Ark. Code Ann. §19-5-303(n)(1)(1987), East Arkansas Community College is supported by public finances and receives an appropriation for maintenance, operation and improvements. Upon reviewing Act 103 of 1973, I find that the community colleges authorized under this provision of law exercises certain functions of state government, namely to levy taxes, acquire property by imminent domain, and dispose of property upon such terms and conditions as meets the requirements for state agencies. Section 4(11). I also find that the Attorney General of the State of Arkansas, in opinion #89-002 has determined that community colleges are agencies of the State for purposes of receiving grants from the Natural and Cultural Resources Grants and Trust Fund. Ark. Code Ann. §15-12-103(1987). As additional authority for the proposition that a community college is a state agency, the State Building Services statutes provide that any institution of higher learning is a state agency under the Arkansas State Building Services Act. Ark. Code Ann. §22-2-102(5)(1987). Community colleges are also authorized to acquire real property. Ark. Code Ann. §6-61-521(1987). In opinion #77-16, the Attorney General of the State of Arkansas was of the opinion that a community college is an agency of state government for purposes of various state laws, it is my opinion that East Arkansas Community College is an agency of state government for purposes of exemption from the Arkansas real property transfer tax, Ark. Code Ann. §26-60-101(1987) et seq.

This opinion is based on the facts as set out in your inquiry as those facts are governed by current Arkansas laws, rules and regulations. Any change in the facts or law could result in a different opinion.

Sincerely,

(s) Rick Pruett
Rick L. Pruett, Attorney
Revenue Legal Counsel

RLP/lmc

[LETTERHEAD]
STATE OF ARKANSAS
OFFICE OF THE ATTORNEY GENERAL
200 Tower Building
4th & Center Streets
LITTLE ROCK, ARKANSAS 72201

STEVE CLARK (501)682-2007
ATTORNEY GENERAL

Opinion No. 89-002

April 24, 1989

Joan W. Baldridge, Director
Department of Arkansas Heritage
The Heritage Center, Ste 200
225 E. Markham
Little Rock, Arkansas 72201

Dear Ms. Baldridge:

This is in response to your request for an opinion regarding Act 729 of 1987, pursuant to which the Arkansas Natural and Cultural Resources Council ("Council") administers and approves all grants payable from the Natural and Cultural Resources Grants and Trust Fund ("Fund"). You have asked, specifically, whether Arkansas community colleges are eligible to apply for grants from the fund.

Act 729 is codified at Arkansas code of 1987 Annotated §15-12-101, et seq. (Supp. 1987). Section 15-12-103(b)(1)(A) states in pertinent part that revenues credited to the Fund are to be "preserved and managed" by the Council "for use in the acquisition, management, and stewardship of state-owned lands or the preservation of state-owned historic sites, buildings, structures, or objects...."

This section appears at first glance to indicate that the grants are to be made in connection with "state-owned lands."

Subsection (b)(1)(B) of §15-12-103 offers further guidance, however, wherein it states that the legislation is intended to authorize grants "... to other agencies of the state authorized by law to acquire, manage, operate, and maintain the lands."

It is my opinion that a community college qualifies as an agency of the state for purposes of §15-12-103. This office has previously opined that community colleges are agencies of the state. See, Attorney General Opinion Numbers 89-E-5, 86-160, 77-16, and 78-9. Perhaps of particular significance for purposes of your inquiry is the fact that community colleges are considered state agencies under the Arkansas State Building Services Act (A.C.A. §22-2-101, et seq.). The Construction Section of State Building Services supervises the bidding and awarding of contracts in connection with state agencies' capital improvements, pursuant to §22-2-107(a)(1)(A). "Capital improvements" are defined under §22-2-102(1) to include "all lands, buildings, structures, utilities, on-site and off-site improvements...which are undertaken, owned, operated, or otherwise managed by a state agency." "State agency" includes any institution of higher learning, A.C.A. §22-2-102(5).

There is thus authority for the proposition that lands acquired by community colleges are state agency lands. Community colleges have specific authority, moreover, to acquire real property. A.C.A. §6-61-521. It is therefore construed as encompassing such institutions, thus rendering them eligible for receipt of grant funds under that act.

The foregoing opinion, which I hereby approve, was prepared by Assistant Attorney General Elisabeth A. Walker.

Sincerely,

(s) Steve Clark
STEVE CLARK
Attorney General

SC:arb

Attachment 8

STATE OWNED LAND IN ARKANSAS

Charlie Daniels
Commissioner of State Lands
State of Arkansas
State Capitol
Little Rock, Arkansas
April 1987

[LOGO]
COMMISSIONER
OF STATE LANDS

Attachment 9

CODE	AGENCY	ACREAGE	LOTS
185	North Arkansas Community College	40.00	00

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

LES HADLEY **PLAINTIFF**

VS. **NO. 94-3035**

NORTH ARKANSAS COMMUNITY TECHNICAL COLLEGE **DEFENDANT**

AFFIDAVIT

Comes now Les Hadley, plaintiff, and upon his oath, states:

1. That I am of legal age and am competent to testify about the matters stated herein;

2. That I am a former employee teacher of defendant North Arkansas Community/Technical School;

3. That the NACTC Foundation ("Foundation") is a separate entity from the College, governed by a separate board of directors, and set up to raise money for the operation of North Arkansas Community and Technical College ("NACTC"). If NACTC has a financial need, then the by-laws of the Foundation set forth a procedure for requesting money from the Foundation. NACTC can make requests for money through the NACTC's Board of Directors, or Dr. Baker, President of NACTC. Individual department instructors can also make requests for money to the Foundation. The Foundation then agrees or disagrees to fund the need with money they have received, or to raise money for a project (e.g.,

the new John Paul Hammerschmidt Business Center). The Foundation can solicit contributions from individuals or companies to be used by NACTC. There are no specific restrictions except that the need has to be something that is outside the general operating expense or budget of NACTC. It can include money for scholarships, building, educational programs, materials, etc.

4. That in the past (and presently), NACTC itself has received gifts from individuals or companies made directly to NACTC to spend as NACTC deems necessary.

5. That NACTC maintains bank accounts in its own name and teachers' salaries and other expenses are paid from these bank accounts bearing the name of NACTC.

6. That in addition to monies NACTC receives from the state of Arkansas, it also receives monies from the federal government, from local millage taxes, from tuition, fines and fees, from direct contributions to NACTC, and from funding from the NACTC Foundation.

7. That Ark. Code Ann. § 19-5-404 and § 19-5-402 permit a maximum allocation of $4,136,701.00 to institutions such as NACTC. These cited statutes do not specify as to what the funds are to be expended for.

8. That the Board of Trustees of NACTC governs the actual day-to-day operations of NACTC. That, among other things, the Board selects its officers, appoints a president, fixes compensation, appoints members of the administration and teaching staff, and fixes their compensation and terms of

employment, enters into contracts, accepts grants and contributions, establishes any retirement plan. (See Attachment #1- NACTC General Personnel Policies). [Not included in Petitioner's Appendix]

9. That Amendment 52 of the Arkansas Constitution gives the General Assembly the authority to establish districts to furnish community college instruction and technical training. However, Ark. Code Ann. §6-61-501(1) provides that "[c]ommunity college" means an educational institution established or to be established by one (1) or more counties or cities of this state...."

10. That Ark. Code Ann. §6-61-520(a) provides that "[t]he local control of each community college shall be vested in a local board composed of nine (9) members who are residents and qualified electors of the community college district." These board members are elected by the district rather than appointed. Ark. Code Ann. § 6-61-520 (b)-(c) (1987).

11. That Ark. Code Ann. §6-61-521 empowers the local board with the authority, among other things, (1) to enter into contracts; (2) to acquire, own, lease, use, and operate property; (3) to dispose of property owned by the college; (4) to exercise the right of eminent domain; (5) to select its own chairman and other officers; (6) to determine, with the advice of the State Community College Board, the educational program of the school; (7) to appoint members of the administrative and teaching staff; (8) to accept grants of money or property from any government or governmental agency; and

(9) to exercise all other powers consistent with state law which may be necessary to establish, maintain, and operate the community college.

12. That Ark. Code Ann. § 6-6-601 (1987) provides that a community college district may, if it wishes to spend larger sums of money than the state funds provide, levy millage to provide additional operation funds. The district may also issue bonds pursuant to Ark. Code Ann. § 6-6-604 (1987).

13. Further the Affiant says not.

(s) Les Hadley
Les Hadley, Plaintiff

STATE OF ARKANSAS)
)ss.
COUNTY OF BENTON)

SUBSCRIBED AND SWORN to before me, a Notary Public this

3rd day July, 1995.

(s) Barbara E. Lingle
Notary Public

My Commission Expires:

Sept. 28, 2002

[NOTARY PUBLIC SEAL
BARBARA E. LINGLE
NOTARY PUBLIC ARKANSAS
BENTON COUNTY]

NORTH ARKANSAS COMMUNITY COLLEGE
HARRISON, ARKANSAS
EMPLOYMENT CONTRACT FOR
PROFESSIONAL EMPLOYEES

THIS AGREEMENT Is made by and between the Board of Trustees of North Arkansas Community College at Harrison, Arkansas, and Leslie Hadley, hereinafter referred to as Professional Employee.

1. The college hereby employs the Professional Employee and the Professional Employee hereby accepts employment of the position of Instructor upon the conditions and terms hereinafter set forth.

2. The term of this agreement shall be for 9 months, beginning August 14, 1992 and ending May 15, 1993.

3. For services, duties, requirements and provisions duly met and rendered by the Professional Employee, the college agrees to pay the sum of $ 23,010 in equal bi-weekly installments. Also, the college agrees to make available an employment benefits program to the Professional Employee with coverages, features and employee contribution rates as approved by the Board of Trustees.

[Paragraphs 4 to 8 omitted from Petitioner's Appendix]

9. Special Provisions are Base Contract - $23,010

In acceptance of the above stipulated agreement --

(s) _____ 8/03/92
Area Vice President Date

(s) Les Hadley 7/28/92
Professional Employee Date

(s) _____ 8/03/92
President
For the Board of Trustees

Payment Installment Basis Election
(check one, if applicable)
Only thru Contract Expiration ____
Thru Fiscal Year End (June 30) X